(17)

IN THE

Supreme Court of the United States

No. 330

G. T. FOGLE & COMPANY, A CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition of G. T. Fogle & Company, a Corporation, for a Writ of Certiorari to Review a Judgment Entered April 20th, 1943, by the United States Circuit Court of Appeals for the Fourth Circuit, Affirming the Judgment of the District Court of the United States for the Southern District of West Virginia, at Charleston, Against Petitioner, Entered on July 18th, 1942; a Petition for Rehearing of which said Judgment of April 20th, 1943, filed June 8th, 1943, was Refused by said Circuit Court of Appeals on June 16th, 1943; and Brief in Support Thereof.

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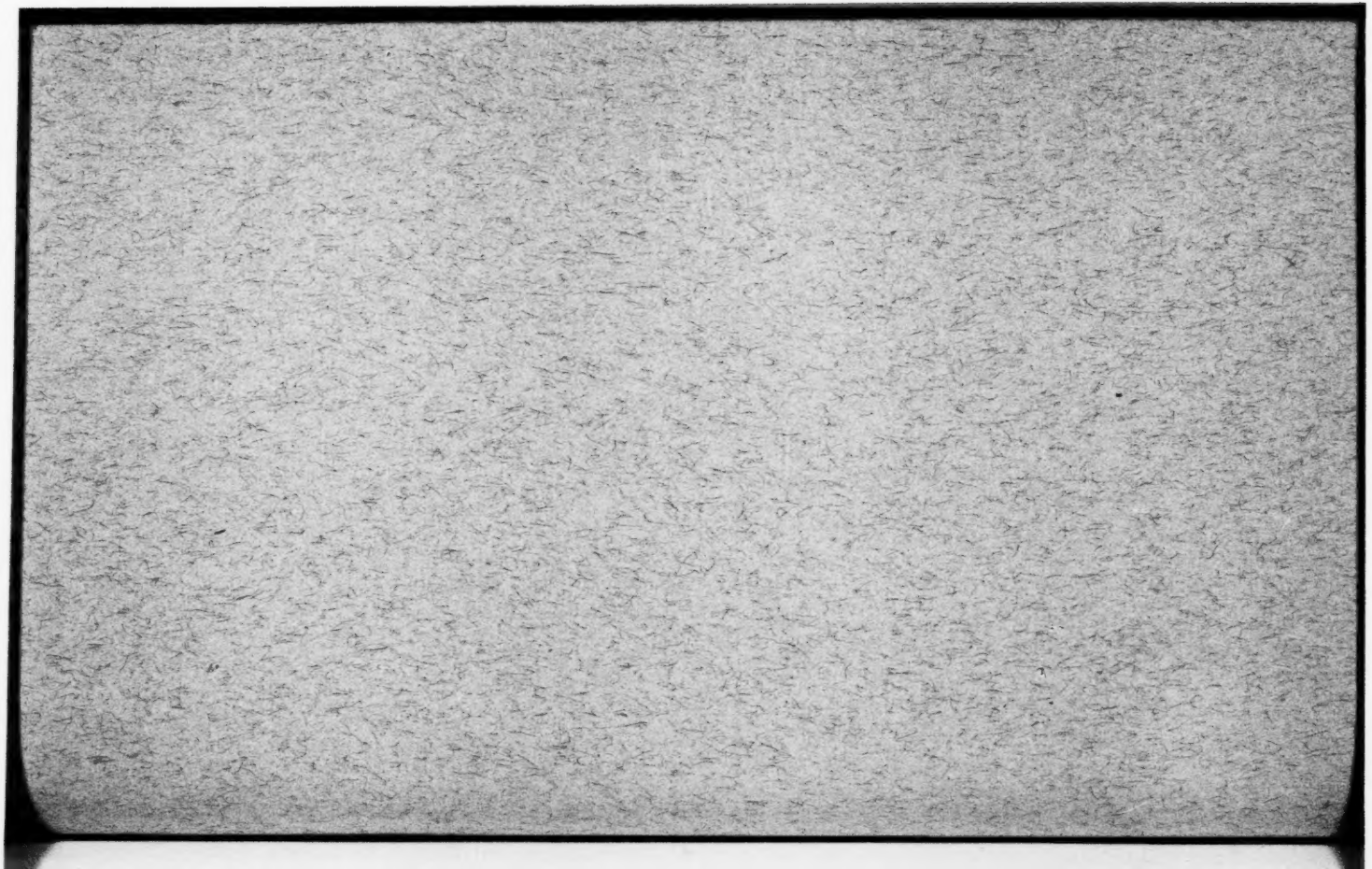

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OPINIONS BELOW.

The District Court of the United States for the Southern District of West Virginia, filed an opinion, found in the transcript of the record at page 3; and the opinion of the appellate court has been printed, is found is found in the transcript of the record (R. 30), and is

reported at page 117 of the advance sheets of 135 Fed. 2d, dated June 14th, 1943.

JURISDICTION.

The jurisdiction of this court for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit of April 20th, 1943, and the refusal to petitioner, on June, 16th, 1943, of a rehearing of said judgment, is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. 347, Sec. 4).

STATEMENT OF THE CASE.

(For brevity and convenience, G. T. Fogle & Company, appellant and petitioner, will be hereinafter designated "the plaintiff"; the United States of America, appellee and respondent, as "the defendant" or "the Government; the District Court as "the trial court"; the Cir-Court of Appeals as "the appellate court"; and the United States Supreme Court as "this court".)

This is a suit instituted under the Tucker Act by G. T. Fogle & Company, a West Virginia corporation, against the United States of America for the recovery of damages for breach by the latter of three separate contracts, made between the Procurement Division of the United States Treasury Department, at Charleston, West Virginia, for the rental of street and road construction equipment to be used by the Works Progress Administration of West Virginia upon the several construction projects to which they were delivered. The three contracts were, respectively, for the rental of a concrete

mixer, a gasoline shovel, and another concrete mixer. Each of these contracts was executed on United States Standard Form No. 33 (Revised); and to this form, the contractual part of which was typewritten, there was attached and made a part of Contract No. 1, for the first concrete mixer, and Contract No. 2, for the rental of the shovel, a printed form designated "Form S. P. O. No. 7, Standard Conditions of Equipment Rental". See transcript of record, Appendix to Brief, p. 7. This printed form was not attached to Contract No. 3, for the second mixer rented, but as it provides that it "shall be attached" to form No. 33, it was treated by plaintiff as being a part of the third contract as a matter of law, and the omission to so attach it by recital as an oversight or inadvertence on the part of the contracting officer of the Government. Photostatic copies of the three contracts are found in the unprinted record as Government exhibits, marked, respectively, Exhibit 2-1 to 2-3, Exhibit 3-1 to 3-2, and Exhibit 1-1 to 1-3. Plaintiff bid upon all three contracts at the invitation of the Government, mailed to a list of equipment owners selected by it, for sealed bids for the services of the designated equipment, and was awarded each of them as the lowest bidder thereon.

Contract No. 1—Concrete Mixer.

This contract, awarded to plaintiff September 17th, 1935, was for the rental of a one bag concrete mixer for 100 hours at seventy-five cents per hour. The mixer was delivered upon the project at West Hamlin, Lincoln County, approximately fifty miles from plaintiff's plant site at St. Albans, West Virginia, on September 23rd, 1935. Before it left the plant site it had been

equipped with a new magneto, fueled and operated by plaintiff's superintendent, and determined to be in first class working condition. On delivery it was receipted for as being in good working condition by the foreman on the project. The transportation cost from St. Albans to West Hamlin was $9.18. After waiting two months without receiving any rental for it, plaintiff wrote to J. R. Downey, the Procurement Division officer who signed the contract for the Government, regarding it, and a month later, at the latter's suggestion, wrote to the WPA district engineer at Huntington, in charge of the West Hamlin project, on the subject. More than four months after its delivery there, plaintiff received a letter, dated January 29th, 1936, from D. W. Harris, acting supervisor of the Fifth District WPA, which letter was the first information of any character received by it in the matter, stating that he had been advised by the engineering department "that they have been unable to use the mixer * * * due to adverse weather conditions", and "that this piece of equipment will not be needed for about sixty days", and offering to permit plaintiff to remove the mixer, and to compensate it for the cost of transporting the same. See Claim No. 1, Exhibit E, with Petition to WPA, Government's Exhibit, Photostat, unprinted record, p. 27. The weather conditions for concrete construction from September 23rd, 1935, to at least December 10th, 1935, were not only not "adverse", but were almost ideal. Upon receipt of this letter plaintiff promptly investigated the matter, and found that the mixer had never been needed on the project, had been requisitioned in error in the first instance, and consequently had never been actually used, and it so wrote officials of the Fifth District WPA. Plaintiff next received a letter from J. M. Oliver, requisitioning engineer at Huntington, offering to pay $65.00

in satisfaction of its claim under the rental contract, that being the amount tentatively allocated for mixer rental in the preliminary engineering estimate of the cost of the project. See Claim No. 1, Exhibit F, Pet. WPA, Government Exhibit, unprinted Record, p. 28. The office of the state WPA administrator at Charleston then advised plaintiff that the Huntington office could recommend payment to it, first, of $75.00 under the contract for 100 hours at seventy-five cents per hour, and, second, under an extension of the contract for a month under Paragraph 6 of Form S. P. O. No. 7, pay for this extension, on the basis of 112 hours, the minimum number of hours per month such equipment was then being operated by WPA, at seventy-five cents per hour, an additional $84.00, making a total payment under the contract of $159.00; and that if settlement on this basis was recommended by the Huntington office it would be approved, and payment made, by the Charleston office. Plaintiff transmitted this information to the Huntington office, and offered to settle its claim for $159.00, but refused to settle it for $65.00. In reply the Huntington office made a counter offer of settlement for $130.00, "even though the mixer has not been in operation since delivery to the job". See Claim No. 1, Exhibit H, Pet. to WPA, Government Exhibit H, Photostat, unprinted Record, p. 34. Plaintiff refused to accept this offer, negotiations with the Huntington office for settlement ceased, and plaintiff filed its petition to the state administrator of WPA, presenting its claim for damages from the breach of the contract by the Government, embodying in the one petition its claims for damages for the breach of contracts No. 2 and No. 3, accrued to it in the meantime. Plaintiff took as the measure of its damages for the failure of the Govern-

ment to use the mixer, its fair monthly rental value of $75.00, the rental being paid by WPA for a like mixer, for the four months it was held at West Hamlin and not used, a total damage of $300.00. The state administrator referred plaintiff's claim under all three contracts, and a fourth claim for the value of certain water pipe which the WPA had appropriated, used, and failed to return to plaintiff, to the Procurement Division, as having executed the contracts for the Government. A factual controversy having arisen as to whether this pipe had been returned to plaintiff (the only disputed question of fact arising between plaintiff and the Government, all matters of fact regarding the three written contracts being admitted by the Government), the deputy administrator of WPA, by letter, directed the Procurement Division, as plaintiff's counsel construed such direction, to submit the question of payment for the pipe, only, to the General Accounting Office of the Treasury Department. See letter E. C. Smith, with Government's Answer, marked X-61, unprinted Record, p. ..... The procurement officer interpreted this letter as a direction to refer, and did refer, the three equipment contracts, as well as the pipe claim, to that office. In his letter to it Mr. Downey, chief purchase officer, who executed the mixer contract for the Government, said, pertaining to the mixer claim of $300.00:

> "The claimant avers that the equipment was held by the Works Progress Administration for a period of four months, and the claim is based on damages sustained by the fact that the equipment was held and not used, thus causing a loss of income that might have accrued should the equipment have been either used by the Works Progress Administration or surrendered to the possession of the claimant. * * *

"The statements made by the claimant that the equipment was held by Works Progress Administration for the period stated are confirmed. * * *

"It is noted that the Deputy State Administrator * * * recommends payment on this claim of $75.00.

"Encumbrance for the amount of $300.00 has been provided on this subject. * * *

"There is no question in the mind of the Procurement Officer but that *the contractor was damaged financially by reason of the Government failing to complete the three contracts covered by the first three claims.* * * *"

(See Downey Letter, R. 11, 14; Exhibits, Photostats, X-13 to X-16, inc., with Government's Answer, unprinted Record, pp. .....

Contract No. 2—Gasoline Shovel.

By contract accepted and executed by the Government on December 7th, 1935, but which, together with "purchase order" thereon, was not delivered to plaintiff until December 12th, 1935, plaintiff rented to the Government, for use on a WPA road project at Kellogg, Wayne County, West Virginia, in the Fifth District of Works Progress Administration, a 5/8 c. y. gasoline shovel, with caterpillar traction (crawler type), for a period of three months, at a rental of $400.00 per month; plaintiff agreeing, for this rental, to furnish and pay an operator therefor and keep the shovel in good repair, and WPA agreeing to furnish gas, oil and grease. A photostat copy of this contract is certified to this court

as one of the original exhibits with the Government's answer certified to the appellate court by the trial court as Exhibit 3-1, 3-2i, 3-2. The contract contains on its face this special and typewritten provision:

> "Time lost on account of machine being unable to operate due to its mechanical condition, or absence of the operator, may be either deducted from this contract or equipment held enough additional time to make up for the time lost."

Acting upon the information, "(400 hours)", in the invitation for bids that the shovel required was to be operated approximately 130 hours per month, an average of about five hours per working day, and the prevailing wages, at the time, of an operator of a shovel of this capacity being $1.00 per hour, plaintiff, before making its bid, contracted with a thoroughly competent and skilful operator to run the shovel at a wage of $125.00 per month, straight time; calculated the cost of the steel lines and minor repairs likely to be required in its operation and upkeep for 400 hours use, the workmen's compensation premiums to be paid for the protection of its shovel operator, the cost of loading and hauling the shovel to Kellogg, a distance of fifty miles, and return, and all other anticipatable factors in the cost of performing the contract, and upon such estimate based its bid of $400.00 per month for the three months contract. Following the award of the contract plaintiff made such replacement of new parts for old, and such repairs, as were necessary to put the shovel in good working condition, and on January 4th, 1936, weather conditions up to that time having made it impossible to do so earlier, loaded the shovel on trailer at the Charleston, West Virginia, airport, where it had

been in use, and delivered it at Snead's siding, at Kellogg, in accordance with the contract, and in charge of the skilled operator mentioned. On January 6th, 1936, plaintiff was advised at the office of the Procurement Division of the Treasury Department, at Charleston, by Mr. J. R. Downey, chief of the purchase division of that office, that the shovel had been rejected at the project by a telephone communication to that office from the Huntington office of WPA; but the grounds for such rejection were not then indicated to the plaintiff or to the Procurement Division. Plaintiff kept a shovel runner in charge of the shovel, on the project, from January 4th to January 11th, and insisted upon a formal rejection of it, in writing, stating the grounds of such rejection. No such rejection was received until January 25th, when there was mailed to plaintiff a notice of cancellation, giving the reason therefor as follows:

> "Cancelled by requisitioner because this is an excavator (rear caterpillar type). Swings less than 180°, and not the shovel of the usual type".
>
> (See Original Exhibit 3-3, Photostat, attached to contract, with Government's Answer, as certified to appellate court.)

Paragraph 9 of Form S. P. O. No. 7 provides:

> "If any item of equipment so delivered does not comply with the requirements of the invitation for bids * * * it may be rejected."

While not material to the contract, the shovel actually had a three-fourths (270°) swing. It fully complied with the requisition therefor, and the requirements of the invitation for bids, and plaintiff was ready, willing, and financially able, and offered to fully perform and

complete its contract for the use and operation of the shovel, with operator, for the full period of three months. At the time of its verbal rejection, on January 6th, 1936, plaintiff was informed at the office of the Procurement Division that the true and actual reason for its rejection, and the cancellation of plaintiff's contract, was that the road project on which it was delivered actually contained approximately 44,000 cubic yards of excavation, which it was planned to remove in 400 hours, or at the rate of 110 cubic yards per hour—almost two cubic yards per minute—, and that through some error or blunder of the requisitioner a shovel of an average capacity of only about 30 yards per hour was requisitioned; and that at the same time plaintiff's shovel was rejected a shovel of 1½ cubic yards capacity was requisitioned for use on the project in removing this large quantity of excavation; and the record shows that this large shovel was thereafter used for this purpose. (See Appendix to Brief, Downey Letter, R. 12.) A detailed statement of the facts as to this contract may be found in Petition to WPA, set out in full in plaintiff's complaint, filed in the trial court, under Claim No. 2, beginning on page 7 of complaint, and found in the transcript of the record sent to this court at page ..... Plaintiff made formal claim, by this sworn petition, against the Procurement Division for the damages it sustained through the breach of the contract by the Government, taking as its measure of damages the profit it could have made if permitted to perform it, represented by the difference between the aggregate rental payment of $1,200.00 and the cost of full performance; which difference amounted to $549.03. (See Complaint, page 10; Transcript of Record, unprinted Record, p. .....) The Procurement Division, which executed the contract, speaking through Mr. Downey, reporting plaintiff's claim under the contract

to the General Accounting Office, said:

> "At the time this equipment was rejected a shovel of 1½ cubic yard capacity was requisitioned and later used for completion of the work on this project. Your attention is called to the reason given for the rejection of the claimant's equipment in that *the rejection was not based on the fact that the equipment did not meet the specifications of the contract.* The claimant has detailed a statement arriving at a claim of $549.03 due as a result of rejection of this equipment *for reasons other than the equipment did not meet with the specifications of the contract.*
>
> "Your attention is again invited to the letter of the Deputy Administrator dated January 25, 1937, which recommends payment of $400.00 on this claim. Encumbrance of $549.03 has been provided on this project * * *.
>
> "This claim is not for actual services but for liquidated damages by reason of violation of contract * * *.
>
> "* * * There is no question in the mind of the Procurement Officer but that *the contractor was damaged financially by reason of the Government failing to complete * * * the contract* * * *."
>
> Downey's Letter, App. to B., R. 12, 14.

The acting accountant-in-charge of the General Accounting Office, stating plaintiff's claim for damages under this contract, said, after quoting the rejection of the shovel by the district director of WPA:

> "It is noted that *the rejection does not state that the equipment failed to comply with the specifications of the contract.*"
>
> (See Auchmoody Statement, App. to B., R. 18.)

The General Accounting Office, rejecting plaintiff's claim under the contract, said:

> "Even though it be admitted, as alleged, *that the equipment was rejected in error,* * * * your claim being one for anticipated profits, and in the nature of damages for breach of contract by the Government, is not for payment *inasmuch as no appropriation is available therefor.*"
>
> (See Settlement Certificate, App. to B., R. 22.)

Contract No. 3—Concrete Mixer.

By contract executed by the Government April 27th, 1936, plaintiff rented to it, for use on a WPA street project in Charleston, West Virginia, a 5 cu. ft. concrete mixer, for a period of one month, at $84.00 for the month. The contract bore on the face of it this special and typewritten provision:

> "Time lost on account of equipment being unable to operate due to its mechanical condition may be either charged against this contract, or equipment held enough time to make up for time lost."

Plaintiff made delivery of the mixer, by truck, on the street project, not over a mile from the office of WPA at Charleston requisitioning it, on April 28th, when the truck driver found that the project had already been completed. He took the mixer to St. Albans, West Virginia, his place of business, and returned it next day, April 29th, to Charleston, and again offered delivery; but plaintiff was then informed by the WPA warehouse keeper there that the mixer, evidently requisitioned in error, would not be received, and it directed the truck driver to return the mixer to its plant site at St. Albans.

Plaintiff paid for the hauling of the mixer from West Hamlin, West Virginia, where it was loaded, to the Charleston project, $9.18. Almost a year later, under date of March 30th, 1937, came the request for the cancellation of the contract, signed by one Davidson, assistant district engineer, and made to the Procurement Division office at Charleston, stating that

> "* * * Equipment was requisitioned in error after completion of project; a balance of $9.18 is being left on this purchase order as claim of such amount was made by vendor to cover cost of moving".
>
> (See Downey Letter, App. B., R. 13.)

Mr. J. R. Downey, in his report to the General Accounting office upon the contract, stated:

> "Contract * * * was entered into April 25th, 1936, with the claimant for one concrete mixer for the rental period of one month * * * at $84.00 per month. The equipment was delivered to the project on April 28, 1936, but was not accepted due to the fact that the project had been completed * * *.
>
> "Encumbrance for the amount of $9.18 has been provided on this project * * *.
>
> "The Deputy Administrator's letter dated January 25, 1937, is again referred to which recommends payment of the amount of $9.18.
>
> (See Downey Letter, App. B., R. 12, 13.)

The acting accountant-in-charge of the General Accounting Office says:

> "Contract * * * entered into by G. T. Fogle and Company with the State Procurement Officer * * * provided for furnishing one * * * Con-

crete Mixer for a period of one month, or 168 hours, for the sum of $84.00.

"Claimant avers that upon delivery of the equipment to the project, the project was found to be completed and there was no need for the equipment. Claimant also states that he was informed by officials of Works Progress Administration that delivery would not be accepted. Claimant asserts his claim in this instance for $9.18 as being the cost of delivering the equipment to the project."

(See Auchmoody Statement, App. B., R. 18, 19.)

The General Accounting Office, rejecting plaintiff's claim of $9.18 as made to the Procurement Division, said:

"It is alleged the payment of $9.18 was incurred as the cost of delivery, for which amount claim is made. Said claim being obviously one for damages is likewise not for payment, there being no appropriation available therefor."

(See Settlement Certificate, App. B., R. 22, 23.)

Following the rejection by the General Accounting Office of all three of plaintiff's claims under the contracts, on the ground that such claims were not for compensation under the contracts, but for damages on account of the alleged breach thereof, and under Section 3678, R. S., the appropriation to Works Progress Administration involved did not provide, expressly or by implication, for the payment of damages therefrom, and consequently no appropriation was available for their payment, plaintiff instituted its action against the United States, under the Tucker Act, for the recovery of its damages upon the three contracts, stated separately, in

the District Court of the United States for the Southern District of West Virginia, at Charleston. The Government filed its answer, setting up as its defense upon all three contracts that none of the equipment was actually used by the Government, it had received no benefit therefrom, and was relieved from liability to plaintiff thereon by Paragraph 5 of Form S. P. O. No. 7 (App. B., R. 8), as follows:

> "All bidders must agree to the rental specified in the invitation for bids, *but the rate agreed upon shall apply to actual operating time only. Payment will be made only for such actual operating time,* as determined by the proper administrative officer." (Underscoring supplied.)"
>
> (See Government's Answer, unprinted transcript of Record, p. .....)

As to Contract No. 2, the shovel contract, the answer made the additional defense that the shovel delivered by plaintiff was rejected as not complying with the contract specifications, and plaintiff's contract was cancelled for that reason. But the facts to the contrary as to this defense are stated above, and the Government's brief on appeal conceded that the facts of the entire case were undisputed.

OPINIONS.

Upon submission of the case, on oral argument only, the District Court sustained the Government's defense, adopting in its written opinion, almost verbatim, the wording of defendant's answer. The pertinent portion of the opinion is as follows:

> "It was admitted by the plaintiff that none of the equipment furnished under the contracts as

to Claims 1, 2 and 3 was ever actually used by the defendant, and defendant asserts that the amounts sought to be recovered under such claims did not represent the value of any service, actually performed, for which benefits accrued to the defendant.

"Form S. P. O. No. 7, entitled "Standard Conditions of Equipment Rental", was attached to and made a part of each of those contracts. It provides, in paragraph five thereof, as follows:

> 'All bidders must agree to the rental period specified in the invitation for bids, but the rate agreed upon shall apply to actual operating time only. Payment will be made only for such actual operating time, as determined by the proper administrative officer.'

"Upon this clause in the contracts the accounting officers of the defendant refused payment of Claims 1, 2 and 3, and denied that there was any liability on the part of the defendant for the amounts claimed by the plaintiff as coming, in any way, under the contracts.

"Under the terms of the contract, and under the law, as I see it, I am compelled to hold that there is no liability upon the defendant upon these claims."

(See App. B., R. 5, 6.)

Following the announcement of the trial court's opinion, plaintiff's counsel requested the district judge, the late George W. McClintic, to reconsider his judgment and permit the filing of a brief in plaintiff's behalf upon such reconsideration. This request was granted, and the brief commencing at page 10 of plaintiff's brief in the appellate court was submitted to him. (See Brief, pages 10 to 39.) Judge McClintic adhered to his origi-

nal opinion, and on July 18th, 1942, during his last illness, the judgment of the District Court against the plaintiff, for the reasons stated in the opinion, was entered by Judge Ben Moore, his successor. From this judgment plaintiff prosecuted an appeal to the Circuit Court of Appeals for the Fourth Circuit, and upon this appeal, on April 20th, 1943, the judgment of the District Court was affirmed, the opinion being rendered by Judge Armistead M. Dobie. The appellate court held:

> "Paragraph 5 of S. P. O. No. 7, which was incorporated into and made a part of each of the three contracts * * * (provides that):
>
> '5. All bidders must agree to the rental period specified in the invitation for bids, *but the rate agreed upon shall apply to actual operating time only. Payment will be made only for such actual operating time*, as determined by the proper administrative officer' (Italics ours.)"
>
> "Under the above provision, * * * pursuant to the contracts, Fogle was to make the equipment *available for use* subject to the condition that the payment of rental fees would be made at the rate agreed upon in the contracts *only* for the actual operating time, *if* and *when* the equipment is used.
>
> "* * * The contracts gave the Government the *right* to use the equipment and to pay for it at the specified contract rate *when* and *to the extent* used. There was imposed on the Government no *duty* to use the equipment * * *."
>
> (All italics within quotation the court's.)
>
> (See Printed Opinion, R. 34, 35; Advance Sheets 135 Fed. (2d), 119, 120, June 14th, 1943.

Plaintiff filed its petition for a rehearing of the case, with a supporting brief, on June 8th, 1943; and rehearing was denied June 16th, 1943.

QUESTIONS PRESENTED.

1. Whether the Government, when through its duly authorized agents and officers it enters into a contract with a citizen in a matter pertaining to the public service, and in the mode provided by law, as to such contract relinquishes its sovereign character, and subjects itself to the same rules of right and justice which all just governments administer between man and man; and if so

(*a*) Whether such a contract is to be interpreted by the federal courts the same as between private individuals, to the end that the intent of both parties thereto, and the object to be attained by both under the contract, may be ascertained and given effect;

(*b*) Whether a promise by the Government to do whatever is essential on its part to effectuate the manifest intent and purpose of the contract is necessarily implied, and as much a part of the contract as if plainly expressed therein;

(*c*) Whether the contract, prepared entirely by and couched in the language of the Government's own officers, is to be construed most strongly against the Government; and

(*d*) Whether the courts should follow and give great weight to the construction placed upon the contract by the Government's own officers, executing it and charged with its performance on the part of the Government.

(*e*) Whether, in the instant case, the appellate court, in construing the obligation of the Government under its contract No. 1, for the rental of a concrete mixer for 100 hours, at the rental rate of seventy-five cents per hour, wholly ignored, first, the primary principle of such construction that a contract must be read as a whole, and effect given to each and every provision thereof, in order to arrive at the true intention of the parties; second, all of the written provisions of the contract, and third, all of the eight other paragraphs of its printed conditions, bearing upon its construction; and by a dialectical construction of a part of one isolated paragraph of these printed conditions alone, determined the contract to be not a rental of the mixer by the Government for 100 use hours, but an option on its part, after delivery of the mixer to the Government, to use it only if and when it chose to do so, and to pay for it, at the agreed rate, only if and when so used; and whether such a construction of the contract, if so reached, should be reviewed by this court.

(*f*) Whether the appellate court, in construing a contract between the Government and a private contractor, is bound by the numerous decisions of this court, the federal appellate and trial courts, and the state courts of last resort, in an unbroken line of authority, that if there is a repugnancy between the printed and written provisions of the contract, the writing is presumed to express the specific intention and agreement of the parties, and will prevail.

2. Whether or not the appellate court, given the three contracts in suit, all prepared by and in the language of the Government, and on the faith of which plaintiff incurred obligations and parted with its prop-

erty, and each of which was susceptible of two constructions, one of which, giving to all the provisions of the contract their natural, obvious meaning, made it fair, customary, rational and probable, and such as prudent men would naturally execute; while the other, by giving to a single provision of the entire contract a curious, hidden sense and meaning, made it unusual, irrational, improbable, harsh and unjust, and such a contract as no prudent contractor would make with the Government or any one else, gave to all three contracts the latter construction, thus working a grave injustice to the plaintiff.

3. Whether or not, under contract No. 1, in suit, for the rental to the Government of a concrete mixer for 100 hours at seventy-five cents per hour, upon the uncontradicted facts, and as a matter of law, there was a taking by the Government of the private property of plaintiff for public use without just compensation, in contravention of the Fifth Amendment to the Constitution.

4. Whether the appellate court, by its final judgment herein, has denied to plaintiff its remedy against the Government, given by the plain intendment of both letter and spirit of the Tucker Act ,while at the same time exempting the Government from the scrupulous performance of its obligations to the plaintiff, as recognized and admitted by its duly authorized agents and officers entering into and charged with the performance of such obligations on its behalf; thus bringing the Government, against its will, into contempt, prejudicing it in its dealings in the common fields of human intercourse, and arousing the indignation of honorable men. *Hiel* v. *U. S.*, 273 Fed. 729.

SUBORDINATE QUESTIONS PRESENTED.

There are two other questions presented by the judgment of which review is sought, neither of them of major importance or necessary to the decision of the case, but the ruling of the appellate court whereon will be assigned as error prejudicial to plaintiff in the event its petition is granted. These questions are:

1. Whether or not the three contracts in suit, for the rental of heavy road and street construction equipment, are, as held by the appellate court, "nothing more than minor varieties of the familiar 'requirements' contracts", as illustrated by *Brawley* v. *U. S.*, 96 U. S. 168, In re *United Cigar Stores of America*, 72 Fed. (2nd) 673, and other cases cited in the opinion (Printed Op., R. 35.)

2. Whether, there being, under the undisputed evidence, no mutual mistake of fact by the contracting parties in entering into Contract No. 2, for the rental of the shovel, and Contract No. 3, for the rental of the second mixer, the appellate court could find such mutual mistake regardless of the evidence, and therefrom adjudicate the hypothesis that if plaintiff had sued to recover its expenses incurred in performing its part of the contracts, the trial court, under the Tucker Act, would have been without jurisdiction of such hypothetical action.

REASONS FOR GRANTING THE WRIT.

1. Application to this court for review of the instant judgment is predicated upon the principle, laid down by numerous federal appellate and trial courts in suits both by and against the Government, and stating as

much a rule of Government polity as a principle of law, that when the Government contracts with a private citizen in a matter pertaining to the public service it relinquishes its sovereign character and immunity, and subjects itself to the same rules which the law applies to contracts between private individuals; and that its contract is to be interpreted the same as one between individuals, so as to ascertain the intent of the parties, and give effect to that intent accordingly. This is the holding in *U. S.* v. *North American Commercial Co.*, 74 Fed. 145, *U. S.* v. *A. Bently & Sons Co.*, 293 Fed. 229, and *Hiel* v. *U. S.*, 273 Fed. 729, a suit under the Tucker Act, in the first case applied against, and in the second in favor of the Government, and in the *Hiel Case* invoked against the United States. It was upon the faith of this principle that this suit was instituted and has been prosecuted to its present stage; and because the appellate court, without questioning, but by implication conceding, the general law, wholly ignored the corollary rules thereunder for ascertaining the intent and purpose of the parties to the contract as uniformly determined by this court, the federal appellate and trial courts, and state courts of last resort, in an unbroken concensus of authority, in deciding the several questions of general law arising upon the construction of the three contracts in suit, its decision therein is not only untenable under the facts, but as much in conflict with the weight of authority on these questions as if there had been an express refusal to follow this authority. For example, it was urged by the plaintiff in both the trial and appellate courts, as to contract No. 1, for the rental of its mixer for 100 hours, (1) that the rental contract must be read as a whole, and each provision thereof given effect, to reach the intention of the parties thereto; and that when so read, there was a necessarily im-

plied promise upon the part of the Government to operate the mixer for a total of 100 use hours, and to pay for its use for that period, which implied promise was as much a part of the contract as if expressed therein; (2) that the contract, being prepared by and in the language of the Government's own officers, should be most strongly construed against the Government; and (3) that the court should accord great weight to the construction in plaintiff's favor given to the contract by the Government's own officers executing it and charged with its performance. In support of the first proposition were cited *Dupont, etc., Powder Co.* v. *Schlottman,* 218 Fed. 353; *Diamond Alkali Co* .v. *P. C. Tomson Co.,* 35 Fed. (2nd) 117; *Great Lakes, etc., Trans. Co.* v. *Scranton Coal Co.,* 239 Fed. 603; *U. S.* v. *A. Bently & Sons Co.,* 293 Fed. 229; *Wildman Mfg. Co.* v. *Adams Top Cutting Mach. Co.,* 149 Fed. 201; *U. S.* v. *Purcell Envelope Co.,* 249 U. S. 313, 63 L. Ed. 620; *Sacramento Navigation Co.* v. *Salz,* 273 U. S. 325, 71 L. ed. 663; *Southern Ry. Co.* v. *Franklin, etc., Railroad Co.,* 96 Va. 693; 6 R. C. L. §244, p. 856, 857; Corpus Juris, §521, p. 558, Corpus Juris Secundum, §328, p. 778, 779; and Williston on Contracts, Revised Ed., §1293, p. 3683; in support of the second, *Garrison* v. *U. S.,* 7 Wall. (U. S.) 688; *Noonan* v. *Bradley,* 76 U. S. 394; *U. S.* v. *A. Bently & Sons Co.,* 293 Fed. 229, and Williston on Contracts, Revised Ed., §621, p. 1788, 1789; and in support of the third, *Pressed Steel Car Co.* v. *Eastern Ry. Co. of Minn.,* 121 Fed. 609; *Garrison* v. *U. S.,* 7 Wall. (U. S.) 688; and Williston on Contracts, Revised Ed. §623, p. 1792. All these authorities were cited, and the matter of each deemed pertinent quoted, in the original brief or the brief in support of plaintiff's petition for rehearing filed in the appellate court. That court, after disavowing any quarrel with plaintiff's statement of the general law that

the contract must be read as a whole, with effect given to each provision thereof in order to arrive at the true intention of the parties (opinion, 135 Fed. (2nd) 117, p. 119), read only a part of one printed paragraph of the contract, ignored all its other provisions, ignored both the fact that the contract was prepared by the Government and the fact that it had been construed by the Government's officers executing it as binding the Government to use the mixer, thus conveniently ignoring the operation of these facts in plaintiff's favor, and found from this one isolated provision that there was no implied promise by the government to use the mixer, but a mere acquisition of an option to use it.

In Contract No. 2, for the rental of a shovel, with its operator, for three months at four hundred dollars per month, no question of implied promise was involved, the promise of the Government to pay the rental being express, absolute, and not conditioned upon the use or operation of the equipment. The only abatement of or reduction from the monthly rental the Government could make was under the typewritten provision of the contract that time lost on account of the shovel being unable to operate due to its mechanical condition or the absence of the operator might be either deducted from the rental, or the shovel held on the work beyond the current monthly period in which the time was lost, and operated without payment, long enough to make up the lost time. This written provision controlled the printed condition of Paragraph 5, Form S. P. O. No. 7, that payment would be made only for the actual operating time of equipment. Contract No. 3, for the rental of the second mixer for one month, at $84.00 for the month, contained the same typewritten provision found in the shovel contract for the abatement of the monthly

rental, except that it applied only to time lost on account of the equipment being inoperable due to its mechanical condition (WPA furnishing the operator). Plaintiff sued for the profit it could have made upon the shovel contract if permitted to fully perform it, and the trivial cost of delivery of the second mixer upon the Government work, relying as to both contracts upon the rule, settled by this court for the past fifty years, that in case of a repugnancy between the printed and written provisions of a contract the writing will prevail, and cited its decisions in *Sturm* v. *Baker*, 150 U. S. 312 (1893), *Hagan* v. *Scottish Ins. Co.*, 186 U. S. 423 (1902), and *Thomas* v. *Taggart*, 209 U. S. 385 (1907), and *Deutschle* v. *Wilson*, 39 Fed. (2nd) 406; *The Addison Bullard* (C. C. A.), 258 Fed. 180; *Pierpont* v. *Pierpont*, 71 W. Va. 431, 76 S. E. 844, 849, 43 L. R. A. (N. S.) 783; Williston on Contracts, Revised Ed., §622, p. 1791; and 13 Corpus Juris, §498, and cases cited. The appellate court, again completely ignoring the existence, in both contracts, of this written provision, and its effect upon their construction, held them to be governed by the printed condition quoted, and, like contract No. 1, mere options to the Government to use the equipment or not, at its pleasure, under which plaintiff assumed the risk of furnishing, at its own expense for replacements, repair and delivery, equipment which might never be used, and no rental therefor ever paid, by the Government.

The appellate court, called upon to give judicial construction to these three contracts between plaintiff and the Government, was bound to follow those rules of interpretation prescribed by the decisions of this court, other federal courts, and state courts of last resort, for attaining the ultimate of all construction, the intention

of the parties at the time the contract was entered into. The facts of the case were undisputed, and all of the evidence was documentary; thus the interpretation of the contracts became purely a question of law, that is, a matter of applying to each contract the rule or rules of construction dictated by its provisions. One of those rules was that if the court found the contract susceptible of two constructions, one of which, by giving to its provisions their natural, obvious meaning, made it fair, customary, rational, and such as prudent men would naturally execute, while the other, by giving to those provisions a hidden, curious sense and meaning, made it an unfair, unusual and improbable agreement, such as prudent men would not be likely to enter into, the interpretation which made the contract fair, rational and probable must be preferred. Plaintiff cited to the appellate court, as declaratory of this rule, the decisions of this court in *Noonan* v. *Bradley*, 76 U. S. 394, and *Garrison* v. *U. S.*, 7 Wall. (U. S.) 688, the circuit court of appeals decisions in *Pressed Steel Car Co.* v. *Eastern Ry. Co. of Minn.*, 121 Fed. 609, *Hawkeye, etc., Assn.* v. *Christy*, 294 Fed. 208, and *Delaware Ins. Co.* v. *Greer*, 120 Fed. 916, 921, and the circuit court decision in *Coghlan* v. *Stetson*, 19 Fed. 727. Regardless of this array of authority in its support, the appellate court again contravened a settled rule for the judicial construction of contracts, by giving to all three an interpretation making them so unreasonable, improbable and unfair that no prudent man would enter into them, and so harsh and unjust to the plaintiff that the court itself felt constrained to admit the harshness, "at first blush", of its interpretation of them.

It will be seen from the foregoing statement that the appellate court, in its construction of the contracts in

suit, has failed to apply thereto at least four of the rules for the construction of contracts prescribed by the weight of authority and invoked by the plaintiff as applicable upon the existent facts, circumstances and situation of each. It has not denied the existence of these rules, nor the weight of authority by which they are buttressed, and thus has not affirmatively decided any question of the general law of judicial construction of contracts contrary to this weight of authority; but by the simple expedient of ignoring the existence of the provisions, facts and circumstances of each of the contracts requiring the application of the pertinent rule or rules of construction, it has by indirection as effectually decided the question of the Government's liability under the contracts contrary to the weight of authority as if that authority were directly challenged. As the rights of the parties to every contract presented for judicial decision must be determined from the intention of the parties, and this intention must be reached by the application of the judicially established rules for its determination arising under the contract, it is of prime importance in every case that these rules be followed; and if, in a given case, and where applicable, they are ignored and not applied, with the result that the true intention of the contracting parties is not reached, the court has indirectly decided the rights of the parties contrary to such established and authoritative rules. If it is important to the administration of justice that these rules be observed by the courts, it is submitted that their non-observance in this case amounts to the decision of an important question of general law and non-jurisdictional federal law in a way both untenable and in conflict with the weight of authority and the applicable decisions of this court, and is such an action or decision of the appellate court as should be reviewed.

2. Under Contract No. 1, in suit, plaintiff, by written contract, rented a concrete mixer to the Government for 100 hours at seventy-five cents per hour, a total rental of $75.00. The mixer was delivered to the Government work, at plaintiff's expense, on September 23rd, 1935, and accepted by the foreman on the work, and receipted for, as in good mechanical condition. To the knowledge of the Government employes in charge of the construction work, the mixer was never needed on the project, having been requisitioned for it in error. It was held on the project, and not used, from September 23rd, 1935, to January 29th, 1936, over four months, and by letter of the latter date plaintiff was notified that it had not been used "on account of adverse weather conditions", and would not be needed for about sixty days, and might be removed from the work, and that the Government would pay plaintiff the cost of removing it. The statement that the mixer had not been used on account of bad weather was knowingly false, and admittedly made to cover up the original blunder in requisitioning it and the subsequent holding of it on the work without notice to the owner that it was not being or to be used and might be repossessed. Mixers of this type and capacity were being rented by the Government for $75.00 per month, and were in great demand, during this four months period. Plaintiff sued the Government for damages for its breach of this contract, and made the measure of its damages $300.00, the fair rental value of the mixer at $75.00 per month for the four months it was held by the Government. The appellate court construed plaintiff's rental contract to be an option to the Government to use the mixer or not, as it saw fit, and to pay seventy-five cents an hour for each hour it was used, and nothing if it was never used; and held that as the Government was not bound to use it there

was no breach of its contract; that as it had not used the mixer the Government had received no benefit under the contract, and that accordingly it owed plaintiff nothing thereunder. Upon the undisputed facts, even if the written contract could be construed as an option, under which the Government, in good faith, took possession of the mixer, with the right to use and the expectation of using it, the taking of it with knowledge on the part of the requisitioning agents of the Government that it never would be used by the Government, and the withholding from the owner of this knowledge and the possession of the equipment for more than four months, was not a taking of the equipment under the written contract, but a tortious taking of it, for which the owner was entitled, under the Constitution, to just compensation, measured by the rental value of it to the owner for the four months it was held by the Government, and not by its value to the Government; the detriment to the owner, not the benefit to the Government, being the basis of the implied promise of the Government to make just compensation for the tortious act of its agents, as upon a fictitional contract implied in fact, and in order to avoid an admission of the tort. This taking of plaintiff's private property by the Government, without just compensation, in contravention of the Fifth Amendment to the Constitution, was called to the attention of the appellate court, which by its refusal of a rehearing of its decision by implication, at least, refused to hold that there was such a taking, with the consequent right to compensation. This decision, it is submitted, is untenable upon the facts, contrary to the decisions of this and other federal courts constituting the weight of authority upon the question, and involves the construction of the Fifth Amendment, and for all these reasons should be reviewed by this court.

3. The plain intendment of the Tucker Act, in both letter and spirit, was to give to persons having claims against the Government for comparatively small amounts the right to bring suits in the courts of the United States in districts where they and their witnesses resided, without subjecting them to the expense and annoyance of litigating in the Court of Claims at Washington. Plaintiff, availing itself of the right given and the remedy provided by the act, sued the Government in the federal district court of its residence for damages for the breach of three contracts for the rental of construction equipment, the aggregate of its damage claimed under all three being less than nine hundred dollars. The officers of the Government who executed these contracts, and its executive administrative agents charged with performance of the Government's obligations under them, all construed the contracts as contracts of rental, recognized its obligation under them to use the rented equipment, admitted the breach of this obligation and the damage to plaintiff caused by such breach, and were ready to pay and offered to pay these damages, and would have paid them but for the ruling of the General Accounting Office of the Treasury Department that damages for the breach of contracts made in behalf of the Works Progress Administration could not be lawfully paid out of the appropriation made to that government agency. The appellate court held that the contracts were not rental contracts, but were options given to the Government to use the equipment; that the Government was not bound to use it, had not agreed to pay rental for it, and had not breached any of the contracts; and that to give the contracts the construction given them by both the plaintiff and the contracting and executive officers representing the Government in the premises would be "a legal solecism, in that it

would force the Government to pay for the use of something it had not enjoyed, and for which it had not agreed to pay." The appellate court's construction of the contracts is wholly untenable. While it purports to relieve the Government from paying for something for which it did not agree to pay, it actually puts the Government, against its will as expressed by its duly authorized representatives, in the equivocal position of refusing to pay its just obligations in an amount the very smallness of which makes this refusal the more embarrassing. In seeking to exempt the Government from the performance of an obligation it had every will and desire to perform, the appellate court has done the Government a distinct disservice, in that the result of the decision is to bring the United States into contempt, and to prejudice it in its future contract relations with its citizens. Congress, by the passage of the Tucker Act, meant to avoid just such consequences as these. It is not of great importance, even to the plaintiff, that it has been denied its remedy under the act other than the bare remedy of suit; but it is important that a decision holding such potentials of injury to the Government's own interests should be reviewed by this court, in the exercise of its power of supervision of the lower courts, and the question of whether the Government's contracts are to be interpreted the same as those between individuals settled by the highest judicial authority.

The petition for a rehearing of the judgment of the appellate court is a part of the record accompanying this application. The brief in support of this petition, and printed with it, while not a part of the record, is asked to be treated and considered by this court as an exhibit, and as such, of possible aid to it in showing the contentions of plaintiff made in the appellate court.

For the foregoing reasons it is respectfully submitted that this petition should be granted.

LILLIAN S. ROBERTSON,
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HENRY S. CATO,
Of Counsel.

IN THE

Supreme Court of the United States

No.....

G. T. FOGLE & COMPANY, A CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

THE FACTS.

Petitioner relies upon the facts as set out in the statement of the case in the petition, and as being agreed by both respondent and the appellate court to be undisputed, and all of them shown by documentary evidence. A further statement of facts in the brief will not be made except where deemed necessary to the argument upon the law.

DESIGNATION OF PARTIES AND COURTS.

For convenience and brevity, the parties to the case and courts and bodies involved will be given the same designations in the brief as in the petition.

ARGUMENT.

I.

In Contract No. 1 there is a necessarily implied promise by the Government to use the mixer, as much a part of the contract as if expressed in words, and indispensable to effectuate the intention of the parties, arising from the language of the contract and the circumstances in which it was made.

By this contract, in the form of an invitation to bid, plaintiff rented to the Government the services of a concrete mixer for 100 use hours—not 100 hours, more or less—, at the rental price of seventy-five cents per hour, and a total rental of $75.00. The invitation, sent by circular letter to nineteen dealers in such equipment, was as follows:

"Rental 7 cu. ft. or 1 bag concrete mixer 100 hours. Quantity, 1, Unit, hr. Unit Price Per hr."

Plaintiff, looking to Form S. P. O. No. 7, attached to and made part of the contract, and adapting its bid to Par. 1 of this form, bid as follows:

"1 bag "Jaeger" concrete mixer, gasoline motor, self-loading, *lessee* "to furnish fuel, grease, oil and operator or operators therefor", Seventy-five (75) cents per hr."

Plaintiff promptly delivered the mixer to the street project at West Hamlin, fifty miles from its plant site, at its expense, and in all respects complied with the contract on its part, as expressed in the typewritten contract and the conditions of the Form S. P. O. No. 7 made a part of it. The equipment was held on the work for more than four months following its delivery, without payment of any rental to plaintiff, or notice that it was not being used, before plaintiff was informed by letter

from the construction supervisor of the work that the engineers had been unable to use it due to adverse weather conditions, and that it would not be needed for about sixty days, and that plaintiff might remove it, and would be compensated for the transportation cost of removal. The statement that "adverse weather conditions" had prevented its use was knowingly false, weather conditions for concrete construction having been almost perfect, the thereafter admitted fact being that it never had been needed on the project, had been requisitioned in error in the first instance, and of course had never been actually used. The trial court, looking only to a part of Paragraph 5 of Form S. P. O. No. 7, held, applying its holding as to this contract as well to the two others in suit, that as this paragraph provided that rental would be paid only for the actual operating time of the equipment, and the Government had not operated it, it had received no benefit under the contracts, and was not liable thereon; and the appellate court, looking solely to the same paragraph excerpt, held as to all three contracts that the Government did not rent any of the equipment, and did not promise, expressly or by implication, to use it; but that plaintiff, by this paragraph, expressly and explicitly bound itself to deliver the equipment to the Government, at its own expense, and give the Government the right to use it, and pay for it only when and to the extent used; the Government being under no duty to use it, and plaintiff assuming the risk of delivering and furnishing equipment which might never be used;—in plain words, that all three contracts were merely options, given to the Government not only without any beneficial consideration to plaintiff, but at the risk of its great detriment, and by which the Government was not only not bound to anything, but expressly relieved from any obligation to

plaintiff. Upon this intrinsic construction of the contracts the judgment of the trial court was affirmed. The first question presented is whether this construction of Contract No. 1, predicated upon the one isolated, printed provision of the contract, standing alone, is tenable under the settled rules of construction applicable thereto, and particularly under the complementary rules that the contract must be "taken by the four corners" and read as a whole, and each provision thereof given effect, in order to arrive at the intention of the parties; and that when so read, if that intention cannot be effected without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied. It is only in the construction of Contract No. 1 that the question of a necessarily implied promise arises; and it arises there, not because the language of the contract leaves the meaning of the parties in doubt, but for the precisely opposite reason—because that language shows so clearly that the object and purpose of neither party to the contract can be attained unless the promise of the Government to operate the mixer 100 hours, and pay $75.00 for its use, is implied and a part of the instrument. Reading the contract as a whole, the sole object and purpose of the Government in entering into it is to rent a mixer for 100 hours use in the construction of a street project at West Hamlin, have it delivered there immediately—the contract provides, "Delivery required immediately"—, and operate it in the due course of its project construction, and from day to day, a total of 100 hours; its engineers on the project having estimated beforehand that the mixer work there could be done with 100 hours use of it, but the contract providing, in Paragraph 6 of Form S. P. O. No. 7, that in case it cannot the Government shall have the option to extend the rental period for thirty days, or any part

thereof, and make further use of the mixer, at the rental rate of seventy-five cents per hour, until its part of the work is completed. R. 8. The sole object and purpose of plaintiff in entering into the contract is to earn the $75.00 rental for its mixer; this is the sole consideration moving to it under the contract, and unless the Government does operate the mixer for the full 100 hours, and pay $75.00 for its services, plaintiff's consideration fails. Thus the implied promise to operate the mixer necessarily arises from the express promise of the Government to pay the $75.00 rent. This implied promise on its part is shown with special clarity by the language of the pertinent paragraphs of Form S. P. O. No. 7, "Standard Conditions of Equipment Rental" (R. 7), referring to plaintiff as "the bidder", and to the United States as "the Government". First (Par. 1), the mixer was to be delivered on the designated project at West Hamlin, and returned to the bidder's plant site at St. Albans, by the bidder, without additional expense to the Government; *i. e.*, the rental of seventy-five cents per hour to be paid for its use covered its transportation cost both ways. If the mixer was not to be *used* at West Hamlin, why require its delivery—and, under the contract, its "immediate delivery"—, there? And if not used, where was the bidder to get his transportation cost?

Second (Par. 2), the bidder was required to guarantee, and did guarantee, by its bid, that the mixer, when delivered on the project, was in first class condition,—meaning, of course, first class mechanical condition for operation on the work. If it was not to be *used*, what difference did it make to the Government whether its mechanical condition was good or bad?

Third (Par. 5): Payment of rental was to be made only for the actual operating time of the mixer, such

operating time to be determined by the proper administrative officer of the Government. If the mixer was not to be *used,* how could there be any operating time to be kept by the Government's officer, and paid for by it?

Fourth (Par. 6): "If the work in connection with which *the equipment is to be used*" was not completed at the expiration of the rental period (100 use hours), the Government had the option to extend such period for thirty (30) days, or any part thereof, at the rental rate agreed upon for the initial period. If the mixer was not *used,* how could the work ever be completed?

Fifth (Par. 7): The bidder was to bear all expenses incident to the maintenance and repair of the mixer, and for depreciation or wear and tear *"resulting from the operation thereof."* If the Government did not bind itself to use the mixer, why bind the bidder, at the bidder's expense, to maintain and repair it against depreciation or wear and tear *resulting from its use?* For, obviously, if the mixer was not operated there would be no wear and tear or depreciation of it, hence no maintenance or repair would be necessary.

Sixth (Par. 8): The bidder was bound to keep the mixer on the job, *"available for use",* for the full rental period,—in this case for an indefinite period during which it was to be operated a total of 100 hours. If the Government did not bind itself to operate the mixer, within this indefinite period, a total of 100 use hours, why bind the bidder to keep it on the job *available for use* until its 100 hours had been worked out?

Seventh (Par. 9 and 10): The bidder was bound to deliver on the job a mixer in satisfactory mechanical condition; if it was not so the supervisor on the job could

reject it, and require the bidder to furnish a substitute satisfactory to him; upon the bidder's failure to do which the Government had the right to procure wherever it could another and substitute mixer, and make the bidder responsible for any excess cost of such substitute beyond the bidder's contract price—, in other words, hold the bidder responsible in damages for its breach of contract. Again, if the Government did not bind itself to use the mixer why was its mecahnical condition material? And if the Government had the right, under the contract, to hold the bidder responsible in damages for failure to furnish it a mixer in satisfactory mechanical condition for use, would not the bidder, after furnishing the Government a mixer in satisfactory mechanical condition, approved by the supervisor on the job, have the reciprocal right to sue the Government for damages for its failure to use the mixer, and for its use pay the bidder the agreed consideration, and the only consideration, moving to it for the performance of its contract?

Finally, what does the Government expressly bind itself to do under the contract? Just one thing,—to pay the bidder, to cover its transportation expense, its maintenance expense, the wear and depreciation upon its mixer, and a profit above all these expenses upon its investment therein, the total sum of $75.00. How and when is this amount payable to the bidder? Under Par. 5 of Form S. P. O. No. 7, at the rate of seventy-five cents for each operating hour of the mixer, and when it has been actually operated for a total of 100 hours. If the bidder is to receive no payment for its mixer unless and until the Government actually operates it for 100 hours, does it not follow, indubitably, that the Government impliedly binds itself to use and operate the mixer for that number of hours? For if the

Government is not bound to use it, so that it may earn the $75.00, then the bidder's consideration for the contract can never become due and payable; there is a total loss to it not only of its transportation expenses and the use of the equipment, but of such margin of profit as there might be in the contract; the bidder is bound, and the Government is not, hence the contract is unilateral; the Government can derive no benefit under the contract without operating the mixer; the sole object of both parties in making the contract is defeated, and the entire contract, as to both, becomes purposeless, futile and meaningless.

The principle of implied promise here relied upon is stated by all authoritative text writers, and applied in almost numberless decisions of federal and state courts; and invariably, in these decisions, it is applied where the implied promise of one party to the contract is necessary to give the other party the consideration for his undertaking. In 6 R. C. L. §244, p. 856, 857, it is thus stated:

> "Necessary implication is beyond doubt as much a part of an instrument as if that which is so implied were plainly expressed. If it can be plainly seen, from all of the provisions of the instrument taken together, that the obligation in question was within the contemplation of the parties when making their contract, or is necessary to carry their intention into effect,—in other words, if it is the necessary implication from the provisions of the instrument—, the law will imply the obligation and enforce it * * *. Whatever may fairly be implied from the terms or nature of an instrument is in law contained in it. One who undertakes to accomplish a certain result agrees by implication to do everything necessary to enable him to perform his contract * * *.

> Whatever the law necessarily implies in a contract is as much a part thereof as if expressly stated therein."

Corpus Juris, §521, p. 558, states it as follows:

> "A contract includes not only what is expressly stated, but also what is necessarily to be implied from the language used; and terms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly expressed on its face."

And *Corpus Juris, Sec.,* §328, p. 778, 779, says:

> "In the absence of an express provision therefor the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made, and to refrain from doing anything which will destroy or injure the other party's rights to receive the fruits of the contract."

Williston on Contracts, Revised Ed., §1293, p. 3683, says:

> "Wherever, therefore, a contract cannot be carried out in the way in which it was obviously expected that it should be carried out without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied."

This principle has been invoked and applied by the federal courts so frequently that only a few of the more outstanding cases may be presented to the court's attention. In *Dupont, etc., Powder Co.* v. *Schlottman,* 218 Fed. 353, on the sale of a fuse manufacturing plant

to the Dupont Company its president wrote a letter to the plaintiff's assignor, Grubb, saying that it was understood that if, after Dupont had had the property for a year, and manufactured fuse successfully, if in the judgment of the president it had been worth $175,000 to the company Grubb would be paid $25,000 in either bonds, preferred or common stock of the Dupont Company, as the latter would elect, in addition to $150,000 in Dupont stock, the purchase price. Dupont took over the plant, operated it for six months, and sold it to other parties, who dismantled it. Grubb's assignee sued Dupont for damages, alleging that Dupont, by selling the plant, wrongfully prevented the test agreed upon, on the success of which the payment of the $25,000 additional depended, and recovered $25,000 in the district court. Dupont appealled, and the circuit court of appeals affirmed the judgment, saying:

> "The letter does not contain any express promise to operate the plant for one year, and the question is whether such a promise is to be implied. We think the court below rightly held that it was. The law implies a promise on the Du Pont Company's part to operate the plant for a year, and that promise must be taken as part of the consideration for which Grubb sold the capital stock."

In *Diamond Alkali Co.* v. *P. C. Tomson Co.*, 35 Fed. (2nd) 117, it was held:

> "Contract providing for loan of money for construction of manufacturing plant which was to use certain raw materials furnished by lender for period of five years imposed an implied obligation on part of borrower to continue in business for period of five years, and buy its supplies from lender during such time, regardless of failure to expressly provide therefor.

> "Whenever a contract cannot be carried out in the way it was obviously expected it would be carried out without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied."

In *Great Lakes, etc., Transp. Co.* v. *Scranton Coal Co.*, 239 Fed. 603, it was held that where plaintiff, a large shipper of coal on the Great Lakes, had contracted with the defendant, a shipowner, to transport its coal for three years, the contract carried with it an implied obligation of the defendant to continue its business during the term, and to run its ships in a reasonable manner in order to carry out its contract with the plaintiff; and that defendant would be enjoined from either selling the ships involved or removing them from the Great Lakes. The court, interpreting the contract, said:

> "There is no express provision that the steamers shall make any trips whatsoever, eastward or westward; there is no express provision that the trips, if and when made, shall extend as far east as Oswego (plaintiff's port of shipment); and therefore defendant contends that the obligation to carry coal westward is conditioned solely upon the transportation company's uncontrollable willingness to run the boats on Lake Ontario. If this be the sound construction of the agreement, the bill must be dismissed, for under such circumstances the court would not tie defendant's hands.
>
> But we cannot accede to these contentions or adopt this construction. The obligation to carry plaintiff's coal on all westbound trips, fairly interpreted in the light of the context and of the relations of the parties out of which the written agreement grew, carries with it the further implied obligation to run the boats * * *.

> "Precedent can throw but little light on the sound interpretation of such contracts, especially as to implied and unexpressed obligations: each has its own individuality, its own background and surrounding circumstances. Words are only symbols, and at times, even in the most formal agreement, but elliptical expressions of the mutual understanding; the underlying mutual intent sought by both parties to be clothed in the language used must be ascertained ° ° ° A bilateral contract of the nature here in question will not lightly be construed so as to give one of the parties a virtual option instead of imposing upon each of them obligations conditioned solely as they may have expressly agreed."

U. S. v. *A. Bently & Sons Co.*, 293 Fed. 229, was an action by the United States on a cost-plus contract for construction of an army camp. On the question of the right of the government to check defendant's books, for the purpose of verifying the cost of construction, not only during the work, but for two years after its completion, the court said, and held:

> "Considering the language of the compound sentence and the caption of the article, the required interpretation, to advance the object of the article and effect the design of the contracting parties, was that the government should have the right ° ° °, and not only as the work progressed, but for a period of two years thereafter. The government's right thus to verify and check up, if not affirmatively expressed, is at least necessarily implied, and what is implied is as much a part of the contract as what is expressed. 9 Cyc., 252, 282; 6 R.C.L. 856."

In *Wildman Mfg. Co.* v. *Adams Top Cutting Mach. Co.*, 149 Fed. 201, the appellate court sustained the

judgment of the trial court, and its holding that

> "Without any special provision in the contract to that effect, it is implied that the Wildman Company, having accepted the position of selling agent, and especially as being the sole selling agent, so that nobody else could put this machine on the market but itself, and to (was obligated to?) exercise reasonable diligence and care in endeavoring to market the machine."

In *Sacramento Navigation Co.* v. *Salz,* 273 U. S. 325, 71 L. Ed. 663, it is held:

> "Under a contract to transport grain on a barge having no power of its own, with the privilege of towing with a steamer, the use by the owner of its own steamer does not make its contract one of towage so as to deprive it of the benefit of the provision of the Harter Act, that if the owner of any vessel shall exercise due diligence to make said vessel in all respects seaworthy and properly manned, neither the vessel nor the owner will be responsible for damages or loss resulting from faults or errors in navigation or in the management of the vessel.
>
> "A contract includes not only the promises set forth in express words, but in addition all such implied provisions as are indispensable to effectuate the intention of the parties, and as arise from the language of the contract and the circumstances under which it was made. 3 Williston on Contracts §1293."

And the court's opinion says:

> "Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract, and the use of the tug must be read into

> that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would be as futile as a contract for the use of a freight car without the locomotive. In this case, however, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for not by the barge, an inert thing, but by the barge and tug, constituting together an effective instrument to that end."

A very strong and well reasoned case in support of plaintiff's position as to the instant contract, and upon which it relied in both the trial and appellate courts as being closely analagous, in both substantive facts and principle, to that contract, as shown particularly by comparison with the applicable paragraphs of Form S. P. O. No. 7, is *Southern Ry. Co.* v. *Franklin, etc. ,Ry. Co.*, 96 Va. 693; 695, 697, 698, 699, 701, 702. There, one railroad company, in 1878, leased its railroad to the receiver of another railroad company for a term of thirty-four years. In 1897 the then lessee plainly manifested its intention to abandon and cease to operate the leased road, whereupon the lessor brought suit in equity to enjoin the lessee from doing so. The Supreme Court of Virginia, on appeal from a decree of the circuit court granting this injunction, and thereby requiring the lessee to continue to operate the road, said, in its opinion:

> "Is the defendant company bound to operate the leased road during the term of the lease, or may it rightfully abandon it and cease to operate it? This is the first question presented for our

determination. Its solution depends upon the provisions of the lease. * * *

* * *

It is apparent, upon a fair construction of the whole instrument, considered in the light of the circumstances under which it was made, that it was within the contemplation of the parties, and their intention, that the road should be maintained and operated during the entire term of the lease. And when we come to examine its provisions critically, the obligation to do ,so though not expressed in words, is plainly implied.

By the lease the Franklin company demised to John S. Barbour, receiver, its whole road * * *, including an equipment of rolling stock not to exceed in value $20,000.00, for thirty-four years * * *, and the receiver, in consideration of said demise, agreed to pay to the Franklin company an annual rental during the term of thirty-four years of a sum equal to seven per centum upon the amount of certain bonds which the Franklin company proposed to issue and secure by mortgage * * * not to exceed $100,000.00. He further covenanted to apply the receipts which might be derived from the property thereby demised as follows:

First: To the payment of the annual expenses of running the road and keeping it and the equipment in proper repair.

Second: To reimburse himself for the payment of the annual rent which he had agreed to pay for the use of the road.

Third: To the payment of a dividend of seven per centum upon the capital stock of the (lessor) company, provided the capital stock should not exceed in par value the sum of $200,000.00.

* * *

In the preamble to the lease there is also the declaration that the Franklin company, when completed, 'will be a valuable feeder to the traffic of the main line' of the Midland railroad.

The leased road could not be a 'feeder', valuable or otherwise, to the traffic of the main line of the lessee unless it was operated.

Neither would there be *annual* expenses of *running* the road, and of keeping it and the equipment in repair, nor *receipts* to pay them, unless the road was operated.

One of the obligations of the Franklin Company, as we have seen, was to furnish rolling stock and other equipment necessary to the 'use and enjoyment' of the road, not to exceed a fixed amount. The obligation to furnish the rolling stock and equipment for the *use* and *enjoyment* of the road implied the corresponding obligation to use it, and to use it was to operate the road.

By the terms of the lease the Receiver was to reimburse himself for the annual rental out of the receipts arising from the operation of the road, and provision was also made for the payment out of the receipts of a dividend to the stockholders.

The stipulations referred to plainly manifest an undertaking by the lessee to operate the road, and are inconsistent with the theory that it might, at its will and pleasure, abandon the road and cease to operate it. * * *

Our conclusion is that the obligation to maintain and operate the road during the term of the lease is a necessary implication from its expressed stipulations. It adds nothing to the written contract to infer an obligation to do what was actually intended by the parties, and what is essential to give effect and vitality to it."

Upon this reasoning the court held, in its syllabus:

> "Although courts are careful in inferring covenants and promises not contained in written contracts, yet what is necessarily implied is as much a part of the instrument as if plainly expressed, and will be enforced as such. If the language of the instrument leaves the meaning of the parties in doubt, the court will take into consideration the occasion which gave rise to it, the obvious design of the parties, and the object to be attained, as well as the language of the instrument itself, and give effect to that construction which will effectuate the real intent and meaning of the parties. In the case in judgment, it is manifest that the intention of the parties was that the railroad leased by the appellee should be maintained and operated by the lessee during the entire term of the lease.
>
> "A necessary inference from a written contract of an obligation to do what the parties actually intended, and what is essential to give effect and validity to it, is not an addition to the contract." (All emphasis the court's.)

The appellate court, in reaching the conclusion, from its construction of the one Paragraph 5, alone, of Form S. P. O. No. 7, that the Government was bound by no promise, express or implied, to use any of plaintiff's equipment involved, sought to distinguish the Government's obligation under the equipment contracts from that of the lessee in the *Southern Railway Case* by finding that

> "° ° ° the lessor transferred all of its property to the lessee for the *sole* purpose of enabling the lessee to operate the road. Thus the *actual operation* of the road was the main inducement and purpose of the contract, so that the lessee was

> under an *affirmative duty* to run the road. There were also several undertakings by the lessee, which seemed to imply an agreement by the lessee to operate the road for the time specified. The finding of an implied promise by the court, therefore, only made explicit that which was implicit. * * * There was imposed on the Government no *duty* to use the equipment, and the instant case is thus clearly distinguishable from *Southern Ry. Co.* v. *Franklin, supra.*"

Of course the railroad was leased for the *sole* purpose of enabling the lessee to operate it, and the *actual operation* of the road was the main inducement and purpose of the contract. And equally of course, as said above, plaintiff leased its mixer to the Government for the *sole* purpose of enabling the lessee to operate it, and the *actual operation* of the mixer was not only the main inducement and purpose, but the whole inducement and purpose, of the contract and of both parties thereto. What other conceivable purpose or inducement could either party to the contract have had? But this case, however often read, will not disclose any state of facts or any principle of law from which the court deciding it derived, or the reader may derive, any *duty,* affirmative or otherwise, on the part of the lessee, owing to the lessor, to operate the railroad, as distinguished from the contractual obligation of the lessee to the lessor to operate it so clearly and unmistakably found and enforced by the Virginia court. (See opinion, p. 701, 702). Out of the breach of certain affirmative duties imposed by law upon a railroad company may arise, and commonly arise, liability *ex delicto,* and in some cases both *ex delicto* and *ex contractu;* but in this case it was never contended, even by the lessee, that there was anything but a breach of contract, a necessarily implied promise

to operate the railroad, "making explicit that which was implicit"; and the lessee defended against the mandatory injunction requiring it to continue the operation of the road that the lessor's remedy was an action at law for damages, but the court held that the legal remedy was not plain, adequate and complete, each day that the road was not operated constituting a separate breach of the contract and necessitating an action and consequent multiplicity of suits.

2.

Contract No. 1, being prepared by and in the language of the Government, must be construed most strongly against it; and the construction given it by the Government's own officers should be followed and accorded great weight.

This contract, prepared by the Procurement Division on its regular form, and including the attached Form S. P. O. No. 7, must have been construed most strongly against the Government in case of a conflict between the parties as to its proper construction, but no such conflict ever in fact arose; to the contrary, there was complete agreement between plaintiff and the contracting and administrative officers of the Government as to its construction. Between the parties there was no abracadabra in the much mooted Par. 5 of the attached form. Both understood that the rental of seventy-five cents should be paid for operating time only, and not for every calendar hour the equipment was on the job, or at the rate of $18.00 per twenty-four hour day; in other words, that the rental was by the use hour, for 100 hours; that the number of hours the mixer was used, in the due course of construction of the project, would be kept by the time-keeper and reported to his imme-

diate superior; and when it had been used a total of 100 hours, the Procurement Division would be notified and would pay the lessee $75.00; and both parties further understood that this total of 100 hours use would be reached within a reasonable time, as a matter of fact, within less than a month, the minimum monthly use hours of like equipment then being 112. No officer of the Government, contracting or administrative, from the Chief Procurement Officer down to the foreman on the job, ever suggested any other construction of the contract, much less suggested that it was an "option" contract, or a "more or less" or "requirements" contract. When the contract was breached by the Government, Oliver, requisitioning engineer, offered to pay $65.00 in settlement of plaintiff's damages; the deputy state administrator, though the equipment had never been used, offered to pay $159.00, the original 100 hours rental at seventy-five cents plus $84.00, 112 hours additional rental, for a thirty day extension of the contract under Par. 6 of Form S. P. O. No. 7, if the Huntington office would recommend it; the Huntington office refused such recommendation, and made a counter offer of $130.00; when formal claim was made on the contract, Smith, deputy state administrator, recommended payment of $75.00; Downey, chief procurement officer, who signed the contract, reported in a formal statement to the General Accounting Office that "there is no question in the mind of the Procurement Officer but that *the contractor was damaged financially by reason of the Government failing to complete * * * the contract*", and that his office was ready to pay the entire claim of $300.00 subject to the determination of that office; and the General Accounting Office rejected the claim under the contract because it was a claim for damages for the failure of the Government to use the mixer, and the appropriation to

the Works Progress Administration did not provide for the payment of damages therefrom. There is thus presented the anomalous situation of a contract prepared by and in the language of the Government, and hence subject to strong construction against it, but in fact construed in the other party's favor by the Government, being judicially interpreted not only against the plaintiff intrinsically, but against the Government's extrinsic construction of it in plaintiff's favor, and consequently against its own interests.

Both of these rules of construction, ignored by the appellate court, were approved and applied against the interests of the Government seventy-five years ago, by this court, in the case of *Garrison* v. *U. S.*, 7 Wall. (U. S.) 688; 690, 692 (1868), involving a contract for army rifles, where there was a written contract, with a supplemental agreement prepared and signed by the Government's officer. The court held:

> "1. The supplemental agreement is signed by General Butler and not by plaintiff. Its doubtful expressions should, therefore, according to a well-known rule, be construed most strongly against the party who uses the language. * * *
>
> "3. This construction (the court's) was acted upon at the time by Major Strong, the officer at whose suggestion it was made, and who certified the account, and paid at that price for the first 2800 guns, and would have paid the same price for the others, but was forbidden by the Secretary of War."

And the judgment of the court of claims was reversed, with instructions to it to enter judgment for plaintiff for the difference between $20 and $27 each for the 3200 guns described in the second voucher.

This court again applied the first of these rules in the case of *Noonan* v. *Bradley*, 76 U. S. 394; 395 (1869), which was a suit upon notes, secured by mortgage, for the purchase money of land, in which defendant pleaded failure of title to the land as a complete defense, under a provision indorsed on the note or title bond by the plaintiff agreeing that on such failure of title the title bond (note) would not be enforced. The circuit court held against the defendant, but this court, construing the indorsement upon the title bond as a perpetual covenant not to enforce it if plaintiff's title to the land failed (as it eventually did), reversed the trial court, and held:

> "Where doubt exists as to the construction of an instrument prepared by one party, on the faith of which the other party has incurred obligations or parted with his property, that construction should be adopted which will be favorable to the latter party; and where the instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—, that one should be favored which upholds the right."

The lower federal courts, needless to say, have heretofore followed this court's holdings in the last named two cases. In *U. S.* v. *A. Bently & Sons Co.*, 293 Fed. 229, the court, citing both, held:

> "Where the government makes a contract with an individual or corporation, it divests itself of its sovereign character as to such transaction, and its contract is governed by the same laws governing individuals, under like circumstances, and a contract in the language of the government's own officers is therefore construed most strongly against it."

And in the case of *U. S.* v. *Newport News Shipbuilding, etc., Co.*, 178 Fed. 194 (C. C. A., 4th Cir.), the court, quoting from and following the *Garrison Case*, and affirming a judgment against the Government, held:

> "The rule that a contract is to be construed most strongly against the party who prepares it applies to the United States with respect to its contracts with private parties."

But in the present case, it will be noted, this same court ignored, first, the decisions of this court, and, second, its own decision, upon the same question of law, arising upon not dissimilar facts.

Apparently doubtful of its own construction of this contract as an option, the appellate court was constrained to find that all three contracts were "nothing more than minor varieties of the familiar 'requirements' contracts" (familiar to whom it did not say), and to cite the case of *Brawley* v. *U. S.*, 96 U. S. 168, to sustain this conclusion. The most cursory examination of the contract and the facts in that case, and comparison with the immediate contract, will disclose their lack of any point of analogy. *Brawley* made a contract with the United States to deliver to an army post "880 cords of * * * wood, *more or less*, as shall be determined to be necessary, by the post-commander, for the regular supply of the garrison of said post" for one year. Before the contract was signed he cut all the wood, and hauled 55 cords to the fort, with the understanding that he assumed all risk regarding its acceptance. Four days after the contract was signed the post-commander learned of it, and notified Brawley that but 40 cords of wood would be required, and forbade his hauling any more to the Government yard; and the army post

did not in fact need more than the 40 cords accepted and paid for by the Government. By the mixer contract, the Government rented the use of plaintiff's equipmentl for 100 hours—not 100 hours, "more or less". The obvious distinction between the two contracts is this: In the *Brawley Case,* the post-commander was to determine, absolutely, how many cords of wood were necessary for the post's consumption, and were to be delivered, before it was delivered, and Brawley was to be paid accordingly; but the administrative officer in plaintiff's contract had nothing to do with determining the number of use hours for which the mixer was rented, this being determined by the contract itself, or the number of hours it was *to be operated,* but was only to perform the purely ministerial act of determining the actual number of hours it *was operated,* and reporting the fact to the Procurement Division, the paymaster under the contract.

3.

In both Contract No. 2 and Contract No. 3 the written provisions thereof dominate and control the printed provisions.

As to Contract No. 2, shovel, the law applicable to and decisive of the obligation of the Government under it is so plain upon the face of the instrument itself, and so long since settled beyond argument by the courts of highest authority, as to render its discussion almost a work of supererogation. The typewritten contract, as shown by the photostat copy of it in the record, is for the rental by the Government from the plaintiff of the shovel described therein for the fixed, definite period of three months, at the fixed, definite rental of $400.00 per month, and a total rental of $1,200.00; the plain-

tiff, for this consideration, to furnish and pay an operator of the shovel, and keep it in good repair, and WPA to furnish oil, gas and grease. It recites that "S. P. O. No. 7 is hereto attached and is made a part of this contract", and following this recital is the typewritten provision:

> "Time lost on account of machine being unable to operate due to its mechanical condition, or absence of the operator, may be deducted from this contract or equipment held enough additional time to make up for the time lost."

While Form S. P. O. No. 7 is made a part of the contract, Paragraph 5 thereof is not applicable to it, for the plain reason that the payment of the monthly rental is not conditioned upon the actual operating time of the shovel, but is made absolute, and there is nothing for the administrative officer under that paragraph to determine; and the only abatement or deduction from the monthly rental that may be made by the Government is under the special typewritten provision above quoted, completely controlling Paragraph 5 of the printed general conditions of rental, wherein the parties agree that in the event the Government loses operating time of the shovel either because of such a defective mechanical condition of it that it cannot be operated, or the absence of plaintiff's operator from the job, in either event it may do one of two things—deduct from the monthly rental the operating time so lost, or hold the shovel beyond the current monthly period in which the time is lost, and operate it without payment, long enough to make up the lost time. To the plaintiff, employing and paying its operator by the month, and bound to keep the shovel in good mechanical operating condition, either reason for abatement of the rent,

and the period of such abatement, would be as quickly and fully known as to the Government itself; it would be immediately called upon to repair the shovel or replace its operator, and to abate the monthly rent accordingly; and in the absence of cause for abating the rent neither party to the contract would have anything to determine except the day of the calendar month it became due. No degree of ingenuity can read into the contract an agreement by plaintiff to deliver this shovel at Kellogg, on the project, to the Government, furnish an operator for it, pay this operator $125.00 per month, straight time, keep him on the shovel for three months, subject to the orders of the Government's representatives on the job, and give the Government an option to operate the shovel, or not, as it saw fit; in the former event paying plaintiff the aliquot part of the monthly rental represented by the operating days, and in the latter nothing. The reason balks at such a proposition, and it would not even be presented here but for the initial statement of the appellate court's opinion that the same legal principles apply to each of the three contracts in suit, and its subsequent holding as to all three, which of course includes this contract, that plaintiff contracted "to make the equipment *available for use*, subject to the condition that the payment of rental fees would be made at the rate agreed upon in the contracts *only* for the actual operating time, *if* and *when* the equipment is used"; and that "accordingly the contracts give the Government the *right* to use the equipment and to pay for it at the specified contract rate *when* and *to the extent* used."

It was deemed unnecessary, in the discussion of this contract in plaintiff's original brief, to cite authority for the statement that the typewritten provision of the con-

tract as to the abatement of rent controlled and prevailed over the provision in Par. 5 of the printed Form S. P. O. No. 7; but in its brief in support of its petition for rehearing, the necessity for so doing seeming to have arisen, the appellate court's attention was called to this court's decisions, the decisions of other federal courts and state courts of last resort, and text authorities, as follows:

In *Thomas* v. *Taggart*, 209 U. S. 385 (1907), the Supreme Court held:

> "Where there is a repugnancy between the printed and written provisions of a contract, the writing is presumed to express the specific intention of the parties, and will prevail * * *."

And the court, in its opinion said:

> "It is a well-settled rule of law that if there is a repugnancy between the printed and written provisions of the contract the writing will prevail. It is presumed to express the specific agreement of the parties."

In *Hagan* v. *Scottish Ins. Co.*, 186 U. S. 423 (1902), the court, construing a written provision of a marine insurance policy which had been given one effect by the district court, and another and different effect by the circuit court of appeals, and reversing the judgment of the appellate court and affirming that of the trial court, quoted and approved the language of the district judge, as follows:

> "The decision of the case depends upon the effect to be given to the words 'for whom it may concern'. This clause, so far as it may be in conflict with other language in the policy, must upon familiar principles be regarded as dominant. It

> expresses the special agreement of the parties, for it is in writing, while the conflicting provisions are in print; and general printed conditions usually give way to deliberately chosen written words."

And the Supreme Court itself said:

> "Where a marine policy is thus taken out upon the blank policy providing by many of its terms for insurance on property or goods on land, it becomes doubly important to keep, and apply with strictness, the rule that the written shall prevail over the printed portion of a policy, as in such case the written, even more clearly than usual, will evidence the real contract between the parties. Courts will not endeavor to limit what would otherwise be the meaning and effect of the written language by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application. If there be any inconsistency between the written provision of the policy and the printed portions thereof, the written language must prevail."

And in *Sturm* v. *Baker*, 150 U. S. 312 (1893), *Mr. Justice Jackson*, considering a contract relating to firearms, upon the question of whether there was a sale or a consignment of the goods, said:

> "It is too clear for discussion, or the citation of authorities, that the contract was not a *sale* of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words 'consign' and 'consignee' employed in the letters were used in their commercial sense,

> which meant that the property was committed or entrusted to Sturm for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other. The words, 'Mr. H. Sturm, in joint account with Hermann Boker & Co.', or 'Bought of Hermann Boker & Co., in joint account', in the bill-head, cannot be allowed to control the express, written terms contained in the contract as set forth in the letters. * * * The contract being clearly expressed in writing, the printed bill-head of the invoice can, upon no well-settled rule, control, modify or alter it."

See, also, to the same effect, *Deutschle* v. *Wilson*, 39 Fed. (2nd) 406; *The Addison Bullard* (C.C.A.), 258 Fed. 180; *Pierpont* v. *Pierpont*, 71 W. Va. 431, 76 S. E. 848, 849, 43 L. R. A. (N. S.) 783; Williston on Contracts, Revised Ed., §622, p. 1791; 13 Corpus Juris, §498, and cases cited.

Plaintiff's suit upon this contract was not for the rental of $1,200.00 which the Government agreed, absolutely, to pay it for performance, but for the profit it could have made if the Government had not by rejection of the equipment in violation of the contract prevented its performance. As in the case of the mixer contract, the contracting and administrative officers of the Government all recognized such wrongful rejection as a breach of the contract, and voluntarily and in writing admitted the Government's liability for damages. Downey, the contracting officer, stated that the plaintiff "was damaged financially by the failure of the Government to complete the contract", and was ready to pay its damage claim of $549.03 in full if the General Accounting Office would approve such payment; Smith, Deputy State Administrator, by letter, recommended to

the Procurement Division the payment of $400.00 in settlement of it; and the General Accounting Office rejected the claim under the contract for the sole reason that being a claim for damages for breach of contract by the Government no appropriation was available for its payment. Thus the appellate court, in its construction of this contract, again ignored, and at least indirectly failed to follow, not only this court's decision in the *Garrison Case* but its own decision in the *U. S. v. Newport News Shipbuilding, etc., Case;* not to mention its disregard of the decisions of the same question by other circuit courts of appeal brought to its attention.

As to Contract No. 3, this typewritten contract, as shown by the photostat copy of it in the record, is for the rental by the government from the plaintiff of the mixer described therein for a fixed, definite period of one month, at the fixed, definite rental of $84.00; the plaintiff, for this amount, to furnish repairs, and WPA to furnish operator, oil, gasoline and grease. Treating the contract, for the purpose of discussion, as reciting, though it does not, that "S. P. O. No. 7 is hereto attached, and is made a part of this contract", as in Contract No. 2 for the shovel rental, there follows this implied recital this typewritten provision:

> "Time lost on account of equipment being unable to operate due to its mechanical condition may be either charged aaginst this contract, or the equipment held enough time to make up for time lost."

Under this special, typewritten provision, completely controlling Par. 5 of Form S. P. O. No. 7, the only abatement of or deduction from the month's rental of $84.00 could have been in the event of "time lost on account of equipment being unable to operate due to its mechan-

ical condition", when the time lost might have been either charged against the $84.00 rent or the mixer held over the month "enough time to make up for time lost." This contract being the same, in essence, as the shovel contract, No. 2, the same reasoning and authorities apply to both, and repetition of them here is needless. Fortunately, plaintiff's actual damage from the clear breach of the Government's contract was only $9.18, the amount it paid for hauling the mixer to the Charleston project. This amount was all it claimed, and its claim was never questioned, and was recommended for payment by Davidson, the assistant engineer on the project, Smith, the deputy state administrator, and Downey, the Procurement Division officer who signed the contract for the Government, but was rejected by the General Accounting Office as being a claim for damages for breach of contract, not subject to payment out of the WPA appropriation; this rejection necessitating direct suit against the Government therefor. But although the contract provided, "Delivery required at once. * * * Equipment will arrive at destination within 3 days from receipt of contract. Delivery date will be one of the determining factors in making the award", the appellate court, holding it also to be an option contract, denied plaintiff recovery of even this trivial delivery expense.

II.

The contracts in suit, giving to all the provisions of each their natural, obvious meaning, were fair, customary and rational, and such as prudent men would naturally execute; but the appellate court, by giving to a single provision common to all three a curious, hidden sense and meaning, made all three unusual, improbable, harsh and unjust, and such contracts as no prudent contractor would make with the Government or any one else.

In the last analysis, this case turns upon the forced, strained and unnatural construction given by the appellate court to the language of Par. 5 of Form S. P. O. No. 7, in order to justify its conclusion that regardless of all their other provisions the language of this one paragraph of a printed form made all three contracts mere options to the Government to use the equipment, by which plaintiff knowingly and expressly bound itself to all of their provisions, while the Government was not bound by any of them. The isolated paragraph, by the express terms of the form of which it was a part, had no application whatsoever to Contracts 2 and 3; but the appellate court, regarding all three as "minor * * * contracts", and, perhaps, not to "take more than one bite at a cherry", nevertheless did apply it to them, and lumped all three contracts together as being options and "requirements" contracts so far as the Government's obligation thereunder was concerned.

It is elementary, of course, that a court, given for interpretation a written contract fairly susceptible of two constructions, one making it fair, customary, and such as prudent men would naturally execute, and the other making it inequitable, unusual and such as prudent men would not be likely to enter into, must prefer the interpretation which makes it a rational and probable agreement to that rendering it an unusual, unfair or improbable contract. Williston on Contracts, Revised Ed., §620, pp. 1786, 1787, states this principle as follows:

> "An interpretation which renders the contract valid, and its performance possible, will be preferred to one which makes it void, or its performance impossible or meaningless."
>
> "An interpretation which makes the contract or agreement fair and reasonable will be pre-

> ferred to one which leads to harsh or unreasonable results."

In *Pressed Steel Car Co.* v. *Eastern Ry. Co. of Minnesota,* 121 Fed. 609, it was held:

> "The intention of the parties must be deduced from the entire agreement, and not from any part or parts of it; because where a contract has several stipulations, it is plain that the parties agreed that their intention was not expressed by any single part or stipulation of it, but by every part and provision in it considered together, and so construed as to be consistent with every other part."

And the opinion, at page 611, said:

> "Where the language of an agreement is contradictory, obscure or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair or improbable contract."

And the circuit court of appeals, in this case, giving the agreement involved an interpretation which made it a rational and probable agreement, said it was consequently unnecessary to consider the car company's assignment of error that the car company's evidence that the parties themselves had construed the contract as the appellate court had interpreted it had been rejected by the trial court.

In *Hawkeye, etc., Assn.* v. *Christy,* 294 Fed. 208, Sanborn, J., construing an insurance contract, said:

> "The natural, obvious meaning of the provisions of a contract should be preferred to any hidden, curious sense which nothing but the exigency of a hard case, and the ingenuity of a trained and acute mind, would discover."

And in support of this holding he cited *Delaware Ins. Co.* v. *Greer,* 120 Fed. 916, 921, where it is said:

> "Contracts of insurance, however, are not made by or for casuists or sophists, and the obvious meaning of their terms is not to be discarded for some curious, hidden sense which nothing but the exigency of a hard case, and the ingenuity of an acute mind, would discover."

This court, in *U. S.* v. *Purcell Envelope Co.,* 249 U. S. 313, 63 L. Ed. 620, in no uncertain terms registered its disapproval of such a construction of the Government's obligation in that case as the appellate court has given that obligation here, particularly in its application to Contract No. 2, for rental of the shovel. In that case the court, affirming an award of damages to the plaintiff below on the Government's appeal, held:

> "A contract to furnish the stamped envelopes and newspaper wrappers that the contractor may be called upon by the Postoffice Department to furnish for four years will not be construed, for the purpose of measuring the damages caused by the repudiation of the contract by the Department, as calling only for such quantities as the Department should see fit to order from the contractor, without reference to the quantities needed,—especially in view of the haste of the Department after its repudiation of the contract

to declare an emergency in its need, and to enter into a contract with others for such envelopes and wrappers."

Upon this point the court said, at page 625, L. Ed.:

"There are other contentions of the government which we may pass without comment except one, which it submits upon a supplemental brief. It is addressed to the rule of damages adopted by the court of claims and argues that it was erroneous, based on the theory, as it is asserted, that the Envelope Company 'had a contract which entitled it to furnish all the stamped envelopes and wrappers of the sizes mentioned in the specification, which the Postoffice Department *should need* (italics counsel's) during the four years' contract.' This is denied, and it is said, quoting the contract, that the Envelope Company was only to 'furnish and deliver promptly and in quantities as ordered,' the envelopes and wrappers 'that it may be called upon by the Postoffice Department to furnish during the four years.' It is difficult to treat the contention seriously. There is something surprising in the declaration that a contract to supply a great department of the government with envelopes and newspaper wrappers which it might need for a period of four years, at a cost of nearly two and one-half million dollars, bore but scant obligation upon the part of the government; or, to be precise and in the language of counsel, that the Envelope Company 'could not have forced the giving of orders (by the government) in excess of fifteen days' supply,' and that this was the extent of the government's obligation. And the further contention is, that the obligation being thus limited, the damages the Envelope Company was entitled to were, at most, 'the expenses incurred in getting ready to per-

> form the contract, and the profits it would have derived from the manufacture and sale' of such fifteen days' supply,—and that all else was expectation and cannot be capitalized by the Envelope Company and made the basis of profits and the responsibility of the government. If the contention be more than dialectical we may express wonder that it was not given prominence in the court of claims, and that in this court it was reserved for the afterthought of a supplemental brief. The further answer may be made that the contract of the Envelope Company was not so dependent as urged, and that its expectation was substantial is evidenced by the haste of the Department, after the revocation of the contract, to declare an emergency in its need and enter into a contract with other companies."

A case in which this rule of interpretation was properly applied, and the contract, one for personal services, given a construction making it a reasonable and equitable instead of an unconscionable agreement, is *Coghlan* v. *Stetson,* (C. C.), 19 Fed. 727. The facts were these:

Coghlan, an English actor, was employed by Stetson under a written contract to play at defendant's New York theater for a season beginning October 8th, 1883, and ending May 3rd, 1884, with the option to Stetson to continue (extend?) the contract for six weeks. Plaintiff Coghlan was to play seven performances each week, but where customary to play more performances, and Stetson agreed to pay him $100 "for each performance *in which he shall appear*". Plaintiff played, beginning October 8th, until November 10th, five weeks, and on that day was informed that his services would not be required for an indefinite period. Plaintiff protested, and notified the defendant of his entire willingness to

play, and that if prevented, and he remained idle, he would insist upon being paid at the rate of $700 per week. He was not permitted to play for three weeks. Subsequently he instituted suit to recover, and did recover, $2,100.00, the salary for three weeks. The defense of Stetson was,

"(1) That plaintiff did not 'appear' during the three weeks period, and the defendant was not required by the contract to permit him to appear * * *; (3) the defendant does not agreed to employ the plaintiff; the agreement is by the plaintiff alone to render services for the defendant; and (4) that in any event the complaint is defective, the action should have been for damages."

The court, in its opinion finding judgment for the plaintiff, says:

> "The principal controversy arises upon the construction of the written contract, and must be determined by that instrument alone. The interpretation contended for by the defendant is so harsh, so unfair, so wanting in reciprocity, that the court should not hesitate to reject it provided the instrument is susceptible of any reasonable construction. According to the defendant no obligation rests upon him to do anything. The plaintiff, on the contrary, * * * is required to leave his home and his profession there (England), cross the Atlantic at his own expense, pay his board in this country from September 24th until May 3rd, and possibly for six weeks thereafter, furnish his own costumes, remain at the beck and call of the defendant for seven months, and refuse all other employment. To all these the plaintiff is bound, and the defendant is not bound at all. In other words, the plaintiff must cross three thousand miles of ocean, lose time,

money and reputation, and if it suits the fancy or whim of the defendant to put some other actor in his place he is wholly remediless, he cannot compel the payment of a single dollar. The charge that this interpretation is severe is not strenuously denied by the defendant, but he insists that the contract was one which the plaintiff was at likerty to make, and having made it he must abide the consequences. Undoubtedly this is so. If the plaintiff made such a contract he cannot recover. But whether he made it or not is the precise question involved. If the language used clearly establishes the defendant's version it would unquestionably be the duty of the court to enforce it. But where the exact meaning is in doubt, where the language used is contradictory and obscure, if there are two interpretations, one of which establishes a comparatively equitable contract and the other an unconscionable one, the former construction should prevail. In such cases the court may well assume that the parties did not intend that which is opposed alike to justice and to common sense. Unless the language is so definite and certain that no other interpretation can be upheld, a construction should not be adopted which must inevitably cast a reflection upon the sanity of one of the contracting parties. * * *

"The objection that the defendant does not agree to employ the plaintiff has already been disposed of. If it were necessary the law would imply an agreement to employ him during the stipulated period, the plaintiff having entered upon the discharge of his duties under the contract and rendered services for the defendant which were accepted by him. But there is here an express agreement. The contract is not unilateral. The one party agrees to act and the other agrees to pay."

The objection to the plaintiff's action that in it he sought to recover a sum of money as wages which he should recover as damages, was held by the court to be formal and technical, and plaintiff was allowed to amend his complaint, upon which amendment he received judgment for the full amount demanded.

Yet in interpreting the obligation of the Government under its Contract No. 1, for mixer rental, upon a state of facts calling for the application of the same salutary principle of construction followed in the *Coghlan Case,* the appellate court has taken one printed form, titled "Standard Conditions of Equipment Rental", and nothing more nor less than the general specifications for the performance by both parties of the actual contract as typewritten on Form 33 (Revised), and upon its face made a part of this substantive, dominant, typewritten contract only "so far as applicable" thereto, as wholly determining the extent of the Government's liability under the contract in its entirety. This paragraph providing that the rate of *rental* agreed upon—here seventy-five cents per hour—shall apply to actual *operating* time only—which is all the plaintiff ever claimed it was to be paid for, no claim, of course, ever having been made that the Government was to pay it seventy-five cents per hour for every calendar hour the equipment was on the project, or at the rate of $18.00 per twenty-four hour day,—and that the number of hours the mixer was operated should be determined by the administrative officer of the Government on the project,—as this fact must have been determined, the equipment owner being fifty miles away, and the Government, only, having access to this information, and necessarily doing the bookkeeping upon the project—, the court, solely upon the wording of an excerpt from the one paragraph, and

disregarding all the other provisions of the contract, read as a whole, has found, assuming such finding to be predicated upon all the facts, as shown by the record and agreed to be undisputed, that plaintiff, presumably, at least, a reasonably prudent contractor, went into the market and purchased a new magneto, the most expensive part of the equipment of its mixer, fueled it, paid its superintendent for testing its mechanical condition, transported it by truck fifty miles, at a cost of $9.18, and delivered it at West Hamlin, on the WPA project, with the knowledge that its return transportation cost would be the same, all under and in performance on its part of a contract by this one isolated term of which the United States government was given the uncontrollable option to retain exclusive possession of the mixer, even as against the plaintiff, upon its public work until that work was completed, and to use it or not, as it saw fit, but was not bound to use it, or pay for it, for a single hour; and under which option, even if exercised, and the mixer operated by the Government, "the total value of the contract" (R. 18) to the plaintiff could have been only $75.00, with a net profit to plaintiff of not to exceed $30.00. So construed, the plaintiff took the risk, without a dollar of consideration therefor, of the total loss of its transportation expense, the loss of possession of the mixer for an indefinite period (actually over four months), during which it might have been, and in fact could have been, rented at a profit upon other WPA projects, and the loss of such margin of profit as there might have been in the contract, to which profit it looked to reimburse it for the new equipment purchased for the mixer; the plaintiff was bound, yet the Government was not; the Government could derive no benefit under the contract without operating the mixer—certainly none from having it stand idle upon the work;

and the entire contract, as to both parties to it, was *ab initio* without effect or vitality,

> "* * * a tale told by an idiot, full of sound and fury, Signifying nothing".

Yet the appellate court holds that a construction of this paragraph excerpt in accordance with the construction given it by both parties to the contract, that the Government did agree and bind itself to lease the mixer for 100 use hours, to use the mixer for 100 hours, and to pay plaintiff for so using it, at the rate of seventy-five cents per hour, the total sum of $75.00, "the total value of the contract", would be "a legal solecism" on its part; thus showing more concern for grammatical punctilio than for this court's admonition in *Noonan* v. *Bradley, supra,* that

> "Where doubt exists as to the construction of an instrument prepared by one party, on the faith of which the other party has incurred obligations or parted with his property, that construction should be adopted which will be favorable to the latter party; and where the instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which upholds the right."

All in all, there is but one conclusion of the appellate court's opinion, in its quality of understatement almost amounting to a Briticism, that its devastating construction of these contracts "may seem harsh, at first blush", with which plaintiff can agree. Such construction is not only harsh at first blush, it is harsher at second blush, still harsher at third blush, and becomes progressively harsher at each succeeding blush, and so on

ad infinitum, until a point is reached at which, in an other connotation of the word, the question of who should do the blushing inevitably arises. Here the court has taken three written contracts for the rental of heavy road construction equipment, the contracting parties to which must be presumed to be, at the least, of ordinary prudence and intelligence, each one clear, precise and definite in all its terms, and fair, customary, reasonable, and such as prudent men would naturally execute, and by a feat of juridical legerdemain—for nothing short of this could convert a gasoline shovel into eight tons of ice cream before the very eyes—, has produced three contracts the like of which "never was on land nor sea", that no contracting officer for the Works Progress Administration or any one else in the construction business ever heard of, much less made,—each an option to the Government to use the equipment, under which the plaintiff, after the expenditure of around four hundred dollars in replacements, repairs, labor and delivery costs upon all of it, took the risk that the Government would use any of it at all, and pay anything whatsoever for such use. This interpretation, the court will bear in mind, is not only not that of the contracting officer of the Government, it is directly contrary to his interpretation and that of the executive officers of Works Progress Administration, all of whom are on record, in writing, as to such construction; and these statements in writing, made within the scope of their authority and against interest, are to be given the highest probative value of any form of evidence. It is the appellate court alone, therefore, which has given these contracts, severally and collectively, a construction "so harsh, so unfair, so wanting in reciprocity and altogether unconscionable", as

"• • • to be opposed alike to justice and to com-

mon sense, and which must inevitably cast a reflection upon the sanity of one of the contracting parties."

The injustice to plaintiff worked by such construction is of relatively minor importance, and but incidental to the main consideration upon which its review is asked,—that in reaching it the appellate court, as shown above, has completely ignored the decisions of this court laying down rules for the construction of Government contracts with private individuals by the only courts having jurisdiction of such contracts, the federal courts themselves; and going still farther, has even refused to follow its own decision of the same question.

III.

Under the uncontradicted facts, in the case of the mixer involved in Contract No. 1, there was a taking of plaintiff's private property by the Government without just compensation therefor, in contravention of the Fifth Amendment to the Constitution.

Plaintiff delivered this concrete mixer, in performance of its rental contract with the Government, to the project designated in the contract on September 23rd, 1935, paying the expense of such delivery as it agreed to do in the contract. The employees of the Government in charge of the construction of the project knew when the mixer was delivered and accepted that it had been requisitioned in error, *i. e.*, that the Procurement Division had been requested to rent it and send it to the project when in fact no such equipment was required there; that it would never be needed, and of course would never be used. Nevertheless, following its delivery and acceptance, it was held on the work until

January 29th, 1936, over four months, when by letter in response to plaintiff's inquiry, a month earlier, as to rental payment, plaintiff was told by the district supervisor that it had not been used "on account of adverse weather conditions", would not be needed for about sixty days, and might be removed from the work, and the Government would pay the cost of removing it. The statement that the mixer had not been used on account of bad weather was false on its face, the weather for nearly three of the four months following its delivery to the Government having been almost ideal for concrete construction; and plaintiff, knowing this, promptly investigated the matter, and found that the mixer had been requisitioned in error in the first instance, had never been needed on the work, and of course had never been used or intended to be used thereon, and so wrote the officials of Works Progress Administration in charge of the project. When efforts to settle its claim with them met with failure, plaintiff set out these facts in a sworn petition to the state administrator of WPA, exhibiting with its petition all of the correspondence on the subject, and when suit became necessary upon the contract made this petition, and the exhibits therewith, a part of its verified complaint in the suit. None of these facts, or the necessary implication therefrom, was ever denied by any one having any connection with the transaction as agent or representative of the Government, and no other excuse for or explanation of the conduct of these Government agents in holding the equipment on the work under these circumstances without notice to the owner that it was neither being used or to be used, was ever offered plaintiff. Plaintiff sued for the fair rental value of its mixer for the four months period, taking the monthly rental value of $75.00 then being paid by the Government for like equipment as the measure of

such value. The officer who signed the contract for the Government confirmed the plaintiff's statement that the mixer had been rented to the Government and held unused for this period; reported that plaintiff had been damaged financially by the failure of the Government to complete its contract, and might have rented the mixer for use on other WPA projects if it had not been held idle by the Government at West Hamlin; and that, subject to the approval of the General Accounting Office, he was ready to pay plaintiff, as damages, the full amount of its claim, though, the equipment not having been used, he was not authorized to pay rental for it. In other words, the contracting officer of the Government, giving to the language of the contract which he prepared and executed its natural, obvious meaning, treated it as being what it actually was, an agreement by the Government to rent the equipment by the use hour for 100 hours; to use it for that number of hours, and to pay at the contract rate for its use; and when the Government failed to use it—"to complete the contract"—, he considered such failure to be a breach of the contract, entitling the other party to damages, the measure of which was the rental income lost "that might have accrued should the equipment have been either used by the Works Progress Administration or surrendered to the possession of the claimant". (R. 11). This common sense treatment of the contract presupposed, of course, that it meant what it said, and that the Government intended to use the mixer for 100 hours at the least, and if the concrete work for which it was to be used was not then completed, to extend the lease for thirty days or less until its work was completed; that is, that the only "option" the Government had was under Par. 6 of Form S. P. O. No. 7 (R. 8), to extend the rental period, at the same hourly rental, *after the*

equipment had been used 100 *hours.* Certainly, when the requisitioner at West Hamlin was in such urgent need of it that the contracting officer specified in the contract "Delivery required immediately", this officer assumed that it was to be used, and its use commenced as soon as it could be delivered on the work, and he consistently acted upon this assumption throughout the entire transaction. The appellate court, however, construed the contract to be an option to the Government to use the mixer or not, as it saw fit, and held that as the Government was not bound to use it there was no breach of its contract; that as it had not used the mixer it had received no benefit under the contract, and consequently owed plaintiff nothing thereunder; and further held that there was no evidence in the record before it to show that the Government did not act in good faith in failing to use the equipment. (R. 35). Upon the undisputed facts, even if the contract could be construed as an option, under which the Government, in good faith, took possession of the mixer with the right to use and the expectation of using it, to some extent, at least—for there could be no good faith in taking it with intent never to use it at all—, the taking of it with knowledge on the part of the requisitioning agents of the Government, at the time of taking, that it never would be used, and the withholding from the owner of this knowledge, and the possession of the equipment, for more than four months, was not a taking of it under the written contract, but a tortious taking of it, for which the owner was entitled, under the Constitution, to just compensation, measured by the rental value of it to the owner for the four months it was held by the Government, and not by its value to the Government; the detriment to the owner, not the benefit to the Government, being the basis of the implied promise of the Government to make

just compensation for the tortious act of its agents, as upon a fictional contract implied in fact, and in order to avoid an admission of the tort. *Hudson Navigation Co.* v. *U. S.*, 57 Ct. Cl. 411; *U. S.* v. *A Certain Parcel, etc.*, D. C. Ga, 1942, 44 Fed. Supp. 712; *O'Reilly De Camera* v. *Brooke*, D. C. N. Y., 135 Fed. 384; *U. S.* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 659; *Hill* v. *U. S.*, 149 U. S. 593; *Langford* v. *U. S.*, 101 U. S. 341; *U. S.* v. *Lynah*, 188 U. S. 446. This taking of plaintiff's private property by the Government, without just compensation, in contravention of the Fifth Amendment to the Constitution, was duly called to the attention of the appellate court, which by its refusal of a rehearing of its decision and judgment by implication, at least, refused to hold that there was such a taking, with the consequent right to compensation. This decision, it is submitted, is not sustained by the facts, is contrary to the decisions of this court upon the question at issue, and involves the construction of the Fifth Amendment, and for all these reasons should be reviewed by this court.

IV.

Instead of relieving the Government from the payment of an unjust claim, the appellate court's decision puts the Government, against its will, in the position of refusing to pay a just and admitted obligation.

The evident purpose and intent of the Tucker Act was to give to persons having claims against the United States for comparatively small amounts the right to bring suits in the courts of the United States in districts where they and their witnesses reside, without subjecting them to the expense and annoyance of litigating in a court located at Washington. *New York, etc., Steamship Co.*

v. *U. S.*, 202 Fed. 311, 312. Plaintiff, availing itself of the right given and the remedy provided by the act, sued the Government in the federal district court of its residence for damages for the breach of three contracts for the rental of construction equipment to the Works Progress Administration, the aggregate of its damage claimed under all three being less than nine hundred dollars. The officers of the Government who executed these contracts, and its executive administrative agents charged with performance of the Government's obligations under them, all construed the contracts as contracts of rental, recognized its obligation under them to use the rented equipment, admitted the breach of this obligation and the damage to plaintiff caused by such breach, and were ready to pay and offered to pay these damages; and would have paid them but for the ruling of the General Accounting Office of the Treasury Department that plaintiff's claims being for damages for breach of contract, and Section 3678, Revised Statutes, requiring appropriations made for the various branches of expenditure in the public service to be expended solely for the objects for which they are respectively made and for no others, and the appropriation to Works Progress Administration not providing, expressly or by implication, for the payment of damages therefrom, damages could not lawfully be paid from such appropriation. R. 59, 60, 61. In the suit necessitated by this admittedly correct ruling, the appellate court held that the contracts were not rental contracts, but were options given to the Government to use the equipment; that the Government was not bound to use it, had not agreed to pay rental for it, and had not breached any of the contracts; and that to give the contracts the construction given them by both plaintiff and the contracting and executive officers representing the Government in the prem-

ises would be "a legal solecism, in that it would force the Government to pay for the use of something it had not enjoyed, and for which it had not agreed to pay." The appellate court's opinion does not give its own construction of the contracts any particular designation; but whatever that construction might be or could be called—and a number of designations of it leap to the mind—, while it purports to relieve the Government from paying for something for which it did not agree to pay, it actually puts the Government, against its will as expressed by its duly authorized representatives, in the equivocal position of refusing to pay its just obligations in an amount the very smallness of which makes this refusal the more embarrassing. For the Tucker Act, in both letter and spirit, is primarily and peculiarly intended, as said above, to safeguard the interests of the small suitor against the Government; the smaller the amount involved the higher being the duty of the court to protect his interests. The opinion of the appellate court does not disclose this unhappy result, for the reason that nowhere therein is there even a hint that representatives of the Government gave any construction, of any character, to the contracts in suit and the Government's obligation thereunder, much less of the factual construction actually given such contracts by these Government representatives. Whatever the explanation of this omission, the effect of it is to ignore a state of facts the disclosure of which must have made the appellate court's conclusion of the nonliability of the Government wholly untenable, and at the same time render its opinion comparatively innocuous upon a casual reading. It is submitted that in seeking to exempt the Government from the performance of an obligation it had every will and desire to perform, the appellate court has done the Government a distinct disservice, in that the result of

the decision is to bring the United States into contempt, and to prejudice it in its future contract relations with its citizens. As so eloquently expressed by Judge Learned Hand, in *Hiel* v. *U. S.*, 273 Fed. 729, 731:

> "Whatever be the justification in policy of the sovereign's immunity, the first consideration should be this: That in the performance of its voluntary engagements with its citizens it should conform to the same standard of honorable conduct as it exacts touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act (this paragraph) meant to avoid such consequences".

It is not of great importance, even to the plaintiff, that it has been denied its remedy under the act other than the bare remedy of suit; but it is important that a decision holding such potentials of injury to the Government's own interests should be reviewed by this court, in the exercise of its power of supervision of the lower federal courts, and the question of whether the Government's contracts are to be interpreted by the federal courts, in which, alone, it is suable, the same as those between individuals, definitely settled and set at rest by the highest judicial authority.

The court, in the consideration of this application, is respectfully asked, before reading either petition or brief, to examine the original, photostat copies of the

three contracts in suit. None of these contracts being in the printed transcript of the record, because their type format made their printing infeasible, it has been found necessary to devote a large part of both petition and brief to a description of each of them and quotation of its pertinent provisions which a brief glance at the contract itself would have made unnecessary; the consequence being to make the petition and brief perhaps double the length they would have been otherwise. The court may be moved to condone this consequence upon reflection that whatever the length of the two documents, in the first place, like the appellate court's conclusions as to plaintiff's equipment, they are only made available to it for reading, and the court is not bound to read either of them, or any part of either of them, having an uncontrollable option in this respect; and in the second place, no matter how tiresome it may be to read them, the task of writing them during the hottest part of the summer was not only unavoidable but immeasurably more irksome.

CONCLUSION.

Upon the whole case it is submitted that for the foregoing reasons the several questions which this application suggests should be definitely settled by this court.

Respectfully submitted,

LILLIAN S. ROBERTSON,
Counsel for G. T. Fogle & Company, Petitioner.

HENRY S. CATO,
Of Counsel for Petitioner.

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553065—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 330

G. T. FOGLE & COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of West Virginia (R. 3–7) is unreported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 30–37) is reported at 135 F. (2d) 117.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fourth Circuit (R. 37–38) was entered on April 21, 1943. A petition for

rehearing (R. 39–44) was denied on June 16, 1943 (R. 45). The petition for a writ of certiorari was filed on September 7, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner entered into three contracts providing for the rental to the United States of certain road-building equipment for designated rental periods. Each contract required petitioner, without additional cost to the United States, to transport the equipment to and from the point of operation and provided that payment would be made to the contractor, at the rate agreed upon, only for actual operating time, as determined by the proper administrative officer. Petitioner delivered the equipment to the site of operations but it was never used by the Government.

The questions presented are:

1. Whether the United States was guilty of any breach of contract entitling petitioner to recover damages.

2. Whether there was a "taking" by the United States of petitioner's property in the case of certain of the equipment which remained unused at the site of operations for some four months.

STATEMENT

Petitioner, G. T. Fogle & Co., and the United States, acting through the Procurement Division of the United States Treasury, entered into three contracts [1] in 1935 and 1936, regarding the rental of two concrete mixers and a gasoline shovel, for use on Works Progress Administration projects in West Virginia (R. 4–5, 20–21, 31). The first contract (ER TPS 41–72) was for the "rental" of "1 bag concrete mixer 100 hours" and specified the unit price as 75¢ per hour (R. 10, 21). The second contract (ER TPS 41–2713) covered the rental of a gasoline shovel for "not to exceed three months" at a "unit price" of $400 per month (R. 4, 17, 22). The third contract (ER TPS 41–4545) referred to the "Rental" of a concrete mixer (R. 18, 22) for the "Rental period one month—168 hours," at a price of $84.00.

The contracts contained "Standard Conditions [2] of Equipment Rental" (Form S. P. O. No. 7), requiring the contractor, among other things (R. 6–9, 26):

[1] Pursuant to stipulation, which appears as page "a" of the printed record here, and also at R. 46–47, the contracts were not included in the printed record, but photostatic copies are available to this Court as part of the certified record. Any references herein to precise terms of the contracts are taken from copies contained in the files of the Department of Justice.

[2] Form S. P. O. No. 7 appears in full in the Appendix, pp. 12–14. This form, attached to and made a part of the first two contracts, was inadvertently omitted from the third contract, but in the lower court petitioner conceded that this was an oversight and waived the defect (Pet. 3; R. 31).

> 1. Without additional cost to the Government, to furnish transportation of all equipment to and from the point of operation, and to furnish fuel, grease, oil and operator or operators therefor, except as otherwise specified in the invitation for bids.

The Standard Conditions also provided:

> 5. All bidders must agree to the rental period specified in the invitation for bids, but the rate agreed upon shall apply to actual operating time only. Payment will be made only for such actual operating time, as determined by the proper administrative officer.

The mixer called for by the first contract was delivered by petitioner and received by the W. P. A foreman in good condition on September 23, 1935, but was never used, remaining idle on the project from that date until February 5, 1936 (R. 5, 16). The gasoline shovel covered by the second contract was delivered at the project, but was rejected by the W. P. A. District Director on the ground that it was "an excavator * * * and not the shovel of the usual type. This shovel can not be used on any job in this District" (R. 17–18).[3] Upon delivery of the concrete mixer cov-

[3] The second and third contracts further provided that "time lost on account of machine being unable to operate due to its mechanical condition (or absence of the operator) may be either deducted from this contract or equipment held enough (additional) time to make up for the time lost."

The matter in parentheses appears only in the second contract.

ered by the third contract, it was found by officials of the W. P. A. that this equipment had erroneously been "requisitioned" after the project had been completed and petitioner was informed that delivery would not be accepted (R. 13, 18–19).

Thereafter petitioner submitted claims to the State W. P. A. Administrator for damages on account of alleged breach of the three contracts (R. 10, 18).[4] The W. P. A. Deputy Administrator recommended partial payment of the first two claims and full payment of the third (R. 11, 12, 13), but on August 9, 1938, the Acting Comptroller General, on final settlement, denied all three claims and certified that no balance was due to petitioner from the United States (R. 20–24). This ruling was based principally on the fact that Paragraph 5 of S. P. O. No. 7 obligated the Government only for "actual operating time," and petitioner's equipment was admittedly never used by the Government (R. 21–22, 23).

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[4] Under the first contract petitioner asked $300 (75¢ per hour for the 100 hour rental period), claiming loss of income resulting from the fact that the mixer remained on the project for four months before notice was given by the Government that the equipment would not be used (R. 11, 16). Under the second contract petitioner asserted that no contention was made that the rejected gasoline shovel failed to conform to specifications and claimed damages of $549.03 (maximum rental of $1,200 less costs of delivery and removal, and operating expenses for three months) (R. 12, 18). Under the third contract petitioner merely claimed $9.18, the cost of delivering the concrete mixer to the project (R. 18–19).

Petitioner then sued under the Tucker Act (28 U. S. C. § 41 (20)) in the District Court of the United States for the Southern District of West Virginia for payment of the claims in question; but the court held that since the equipment had not been used, there was no liability on the part of the United States, in consequence of the aforementioned paragraph (R. 2–6).[5]

On appeal, the United States Circuit Court of Appeals for the Fourth Circuit affirmed the judgment of the district court (R. 30–37). After referring to Paragraph 5 of Form S. P. O. No. 7, the court held that "pursuant to the contracts, Fogle was to make the equipment *available for use* subject to the condition that the payment of rental fees would be made at the rate agreed upon in the contracts *only* for the actual operating time, *if* and *when* the equipment is used" (R. 34–35). A petition for rehearing was denied (R. 45–46).

ARGUMENT

No question of substantial or general importance is involved. The rules concerning the construction of contracts are not in dispute and there is no conflict of decisions. The only issue is whether under the particular circumstances petitioner has established a breach of contract entitling it to recover,

[5] Petitioner's suit also covered a claim of $80 for the rental of certain pipe, which the Government allegedly never returned (R. 5, 13–14), and recovered judgment for $80 on this count (R. 6–7). This item is not here involved.

and on this issue the decision below is clearly correct.

1. The United States committed no breach of contract. In each case, Paragraph 1 of Form S. P. O. No. 7 bound the petitioner "without additional cost to the Government, to furnish transportation of all equipment to and from the point of operation"; Paragraph 5 provided that the agreed rental rate "shall apply to actual operating time only" and that "payment will be made only for such actual operating time, as determined by the proper administrative officer" (R. 6, 7, 8, 31).

Since it is conceded that none of the equipment covered by the contracts was ever actually used by the United States, and there is no evidence of fraud or bad faith on the part of the Government in failing to use the equipment (R. 35), these provisions conclude the case against petitioner, for their effect was to "commit(s) the government to nothing but to pay for" actual operating time. Cf. *Bulkley* v. *United States,* 19 Wall. 37, 40; *Lobenstein* v. *United States,* 91 U. S. 324; *Brawley* v. *United States,* 96 U. S. 168; *Kihlberg* v. *United States,* 97 U. S. 398.

From the standpoint of the Government's liability, the "contracts" in question constituted nothing more than offers by petitioner for the execution of unilateral contracts, which could ripen into "valid and binding" agreements only if and when accepted by the Government's actual use of the equipment. Cf. *Willard Co.* v. *United States,*

262 U. S. 489, 493, 494; *Atwater & Co.* v. *United States,* 262 U. S. 495, 498. And the chance that the offers would not be accepted "was a risk the company assumed, and no reason is perceived from relieving it from the consequences." *North American Com. Co.* v. *United States,* 171 U. S. 110, 127.[6] The only effect of the designated "rental periods" here was "to signify a purpose on the part of the government * * * [which] was liable to be changed at any time before it was executed." See *Bulkley* v. *United States,* 19 Wall. 37, at 40.

2. In connection with the first contract (ER TPS 41–72) petitioner seeks to avoid the impact of Paragraph 5 of Form S. P. O. No. 7 by arguing that this contract includes "a necessarily implied promise by the Government" (Pet. 34) to use the concrete mixer for the full 100-hour "rental period" (Pet. 36); that the contract must be construed in petitioner's favor because prepared by the United States; and that the recommendations by the Government's own officers are entitled to great weight (Pet. 51–56).

These arguments have no merit in the case of an unambiguous contract. The obligation of the

[6] Conceding that the same rules of construction applicable to contracts between individuals apply to contracts to which the United States is a party, there are no special "ideas of equity" by which only the Government is bound. Cf. *Smoot's Case,* 15 Wall. 36, 45.

United States being unequivocally limited to payment for actual operating time, "no exposition is allowable contrary to the express words of the instrument" (*Kihlberg* v. *United States,* 97 U. S. 398, 402), and it is immaterial whether, as petitioner repeatedly urges (Pet. 52, 63, 67, 74, 77), the construction or contracting officers believed or recommended that petitioner was entitled to damages.[7] Cf. *Brawley* v. *United States,* 96 U. S. 168, 173; *Simpson* v. *United States,* 199 U S. 397, 399;

[7] Actually, there is real doubt that the Government contracting officials accepted petitioner's view of the Government's commitment. Petitioner's main reliance in this connection is on the letter (R. 10–15) from the Treasury Procurement Office for West Virginia to the U. S. Treasury Accounts Office, at Charleston, West Virginia (Pet. 52). But this letter merely expresses an opinion as to whether "the contractor was damaged financially"; it does not reflect the views of the contracting officer as to the proper interpretation of the contract, or as to whether the United States was liable in damages for any breach thereof. For, after noting that, "There was no actual use of the equipment and payment cannot be authorized against this contract" (R. 10–11), the letter expressly declares that, "Recommendation for payment or rejection of this claim is not within the scope of the jurisdiction of the State Procurement Officer and the claim is presented only for the action of the General Accounting Office" (R. 11).

The recommendation of the W. P. A. Deputy Administrator that petitioner should be compensated in damages cannot be considered as a contemporaneous construction of the agreements by one of the contracting parties, since the contracting agency for the United States, as the contracts show on their face, was the Procurement Division of the United States Treasury.

Bowers Dredging Co. v. *United States,* 211 U. S. 176, 185, 187–188. Nor could any such officials waive any contractual rights of the United States. Cf. *American Sales Corporation* v. *United States,* 32 F. (2d) 141 (C. C. A. 5), certiorari denied, 280 U. S. 574.

Acceptance of petitioner's proposition that the Government impliedly undertook to use the mixer for the full rental period, leads to the anomaly, as the lower court pointed out, that by failing to use the equipment at all the Government became liable for the maximum rental, whereas if the equipment had been used only for a few hours, petitioner "could have recovered *only* for such limited use and no more" (R. 34–35).

3. There is no substance to petitioner's further argument, in regard to the first contract, that there was a taking of its property without just compensation, within the meaning of the Fifth Amendment (Pet. 75). Petitioner bases this argument on the fact that the mixer in question remained at the site of the W. P. A. project to which it was delivered for some four months before petitioner was advised, in response to an inquiry of a month earlier, that it might be removed (Pet. 75–76). The property in question was in no sense "taken" by the Government within the meaning of the Fifth Amendment. On the contrary, it was delivered by petitioner to the site of the project for a specified period, pursuant to a contract voluntarily made and specifying the conditions under which

petitioner was to be paid.[8] Cf. *Swift & Company* v. *United States,* 43 C. Cls. 409, 422; *Klebe* v. *United States,* 263 U. S. 188, 191–192; *Chesapeake & Potomac Telephone Co.* v. *United States,* 281 U. S. 385, 388; *Interocean Oil Co.* v. *United States,* 270 U. S. 65, 69; *Ball Engineering Co.* v. *White & Co.,* 250 U. S. 46, 57; *United States* v. *North American Co.,* 253 U. S. 330, 335.

4. In an attempt to circumvent Paragraph 5 of Form S. P. O. No. 7, in connection with the second and third contracts, petitioner seeks to spell out a conflict between that provision and the following provision, contending that this one shows a purpose to bind the Government to pay for the full "rental periods," and must control, being typewritten, rather than printed (Pet. 56–62):

> "Time lost on account of machine being unable to operate due to its mechanical condition, or absence of the operator, may be

[8] The lower court correctly decided that no recovery could be allowed for expenses of delivery, on the theory of a mistake of fact which induced the second and third contracts. For the meeting of minds which would be prerequisite to the implication of a contract in fact to pay for those expenses (see *B. & O. R. R.* v. *United States,* 261 U. S. 592, 597) is precluded by the express provisions of Paragraph 1 of Form S. P. O. No. 7, requiring petitioner, "Without additional cost to the Government, to furnish transportation of all equipment to and from the point of operation * * *" (see Appendix, p. 13). Petitioner does not urge this theory, and in fact disputes the conclusion below that the second and third contracts resulted from mutual mistakes of fact (Pet. 21).

deducted from this contract or equipment held enough additional time to make up for the time lost."

But this provision, instead of conflicting with Paragraph 5 of Form S. P. O. No. 7, reinforces the latter provision, making doubly clear the intention to obligate the Government only for the "actual time" that petitioner's equipment was in use. The obvious purpose of this clause was to protect the Government against loss of time, due to the specified causes, once the equipment had been put into actual operation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

DAVID L. KREEGER,
Special Assistant to the Attorney General.

K. NORMAN DIAMOND,
Attorney.

SEPTEMBER 1943.

APPENDIX

Form S. P. O. No. 7 provides as follows:

STANDARD CONDITIONS OF EQUIPMENT RENTAL

Each bidder, by submitting a bid for the rental of equipment, agrees to the following terms and conditions:

1. Without additional cost to the Government, to furnish transportation of all equipment to and from the point of operation, and to furnish fuel, grease, oil and operator or operators therefor, except as otherwise specified in the invitation for bids.

2. That, by the submission of his bid, the bidder has guaranteed and does guarantee that all equipment furnished is in first-class condition and will pass the inspection of, and meet the requirements of, the State Industrial Commission or other State or municipal body or bodies (if any) constituted for the purpose of inspecting the type or types of equipment offered for rental in the State or municipal sub-division in which the work is to be conducted.

3. No bid will be considered which is not accompanied by evidence, satisfactory to the State Procurement Officer, that the bidder is the legal or beneficial owner of the equipment offered for rental. Rented equipment, or equipment held or controlled by the bidder under any agreement or understanding analogous to an agreement of rental, will not comply with this requirement.

4. The State Procurement Officer reserves the right to reject any or all bids, to waive

any informality in bids, and, unless otherwise specified by the bidder, to accept any item in the bid.

5. All bidders must agree to the rental period specified in the invitation for bids, but the rate agreed upon shall apply to actual operating time only. Payment will be made only for such actual operating time, as determined by the proper administrative officer.

6. If the work in connection with which the equipment is to be used is not completed at the expiration of the rental period, the Government shall have the option to extend such period for thirty (30) days, or any part thereof, at the rental rate agreed upon.

7. The bidder shall bear all expenses incident to the maintenance and repair of all equipment rented, and for depreciation or wear and tear resulting from the operation thereof.

8. When first ordered by the supervisor on the job, any item or items of equipment shall be delivered to the location designated in such order within three (3) days from the date thereof. All equipment shall thereafter remain available for use on the job for the full rental period, except as otherwise specified herein or in the invitation for bids.

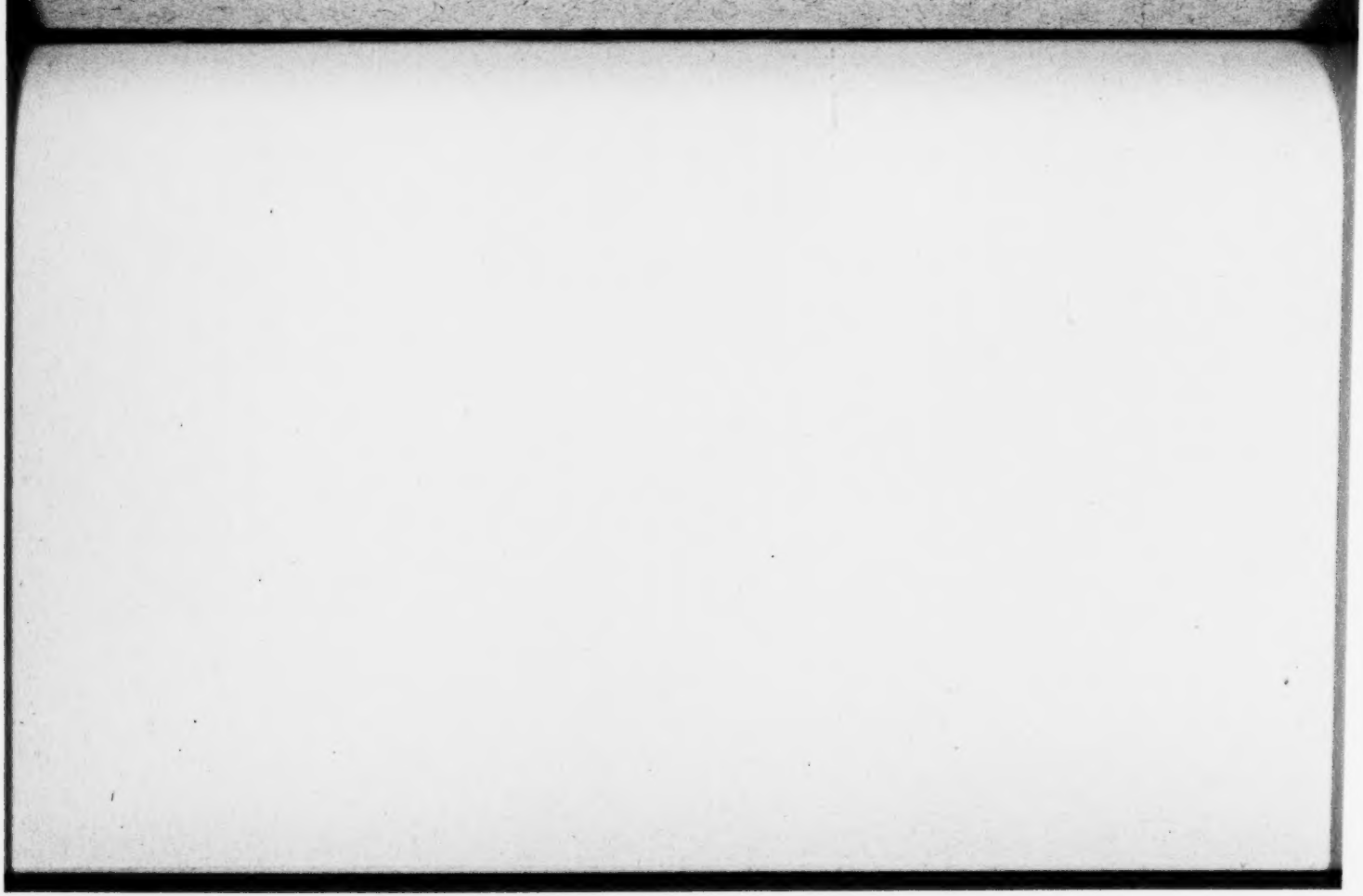
9. The supervisor on the job shall inspect all equipment when delivered. If any item of equipment so delivered does not comply with the requirements of the invitation for bids, or is unsafe or in unsatisfactory mechanical condition, it may be rejected by the supervisor on the job, and it shall be the duty of the bidder to furnish a satisfactory substitute therefor.

10. In case of default of the contractor, the Government may procure any or all items of equipment called for by the contract from other sources, and the contractor shall be responsible for any excess cost occasioned thereby.

11. In the case of bidders on the register of the United States Employment Service, the provisions of paragraphs 9 and 10 shall not apply except that unsafe equipment, or equipment not complying with requirements or in unsatisfactory mechanical condition may be rejected. Such bidders will be paid at the rental rate for actual operation of any item or items not rejected. The Government may at any time, upon three (3) days written notice, terminate the further rental of any or all equipment from any such bidder.

12. This agreement shall be attached to U. S. Standard Form 33 (Revised), and the terms and conditions agreed upon shall be in addition to the conditions therein provided, which shall likewise apply so far as applicable.

U. S. GOVERNMENT PRINTING OFFICE: 1943



IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 330

G. T. FOGLE & COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Petition of G. T. Fogle & Company for a Rehearing of the Judgment of the Supreme Court of the United States Herein, Rendered on the 18th day of October, 1943, Denying Petitioner said Writ of Certiorari.

LILLIAN S. ROBERTSON,
Counsel for G. T. Fogle & Company,
Petitioner.

HENRY S. CATO,
Of Counsel.

SNYDER PRINTING CORPORATION, CHARLESTON, W. VA.

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IN THE

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Petition of G. T. Fogle & Company for a Rehearing of the Judgment of the Supreme Court of the United States Herein, Rendered on the 18th day of October, 1943, Denying Petitioner said Writ of Certiorari.

To the Honorables, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, G. T. Fogle & Company, petitioner in the above entitled application for a writ of certiorari to the judgment of the United States District Court of Appeals for the Fourth Circuit, respectfully represents that it is aggrieved by the judgment of this honorable

court, rendered herein on the 18th day of October, 1943, denying to it said writ of certiorari.

Petitioner says that it duly filed its petition for said writ, and brief in support thereof, in this court on the 7th day of September, 1943; and that the Solicitor General duly accepted service of said petition, brief, and transcript of the record upon respondent on, to-wit, September 11th, 1943; that the brief of respondent in opposition to the granting of said writ was filed on or about October 2nd, 1943, and copies thereof furnished to counsel on October 4th, 1943; that the exact dates of such acceptance of service and filing of opposition brief by respondent's counsel are unknown to petitioner, but will be shown by the record thereof in the office of the clerk of this court; but no question is made or intended to be raised by petitioner as to whether respondent's brief was filed within the time prescribed therefor, and if not so filed petitioner waives any right it may have had or now has to object upon this ground to the filing or consideration thereof. But petitioner says that all events, between the time said brief reached the hands of petitioner's counsel and the time of the convening of this court and the presentation of said petition and briefs of counsel thereon for its consideration, it was impossible for petitioner's counsel to prepare and file a reply to respondent's brief, and that in fairness to petitioner it should be given opportunity to present its reply to said brief, for the consideration of this court before its judgment denying said writ of certiorari shall become foreclosed; this for the following reasons, among others:

That petitioner's contentions upon said application were:

1. That in the contract for the rental of the mixer for 100 hours at seventy-five cents per hour there was a necessarily implied promise by the Government to operate the equipment for the full one hundred hours.

2. That under the contract for the rental of the shovel, with operator, for three months at $400.00 per month, the monthly rental was only subject to abatement for shovel time lost by the mechanical failure of the shovel to operate or the absence of the shovel operator; *silicit* under the contract for the rental of the second mixer for one month, on account of its inoperable condition.

3. That the contracting officer for the Government and the executive officers of the Works Progress Administration gave a like construction to all three contracts, and the contracting officer made formal finding and report to the Comptroller General that all three had been breached by the Government, to petitioner's damage.

4. That the Comptroller General had rejected petitioner's claim under all three contracts, referred to him at the direction of the Deputy State Administrator by the State Procurement (contracting) Officer, upon the sole ground that the claim under each was for damages for breach of contract by the Government; that under Section 3678, Revised Statutes, appropriations made for expenditure in the public service were required to be expended solely for objects for which they were respectively made, and no others; and that the appropriation to Works Progress Administration did not provide, expressly or by implication, for the payment of damages, and there being no appropriation available therefor,

there was no authority for the payment of the claims, or any of them. R. 21, 22, 23.

That the appellate court, without reference in its opinion and judgment to the construction given the contracts by either the Government's contracting officer, its executive administrative officers, or the Comptroller General, or even an indication that any construction by any of them had been given thereto, held that under Par. 5 of printed Form S. P. O. No. 7, providing that payment of rental would be made only for "actual operating time", all three contracts were mere options to the Government to use the equipment, and, it not having been used, there was no breach of the contracts by the Government.

That in the brief for the Government its counsel, after stating that "the only issue is whether under the particular circumstances petitioner has established a breach of contract entitling it to recover", take the position that the decision below is clearly correct, because:

1. The contracts were nothing more than options,– "offers by petitioner for the execution of unilateral contracts, which could ripen into 'valid and binding' agreements only if and when accepted by the Government's actual use of the equipment"; and that there was no necessarily implied promise by the Government in the first contract to use the mixer for the full one hundred hours for which the latter rented it. To this point were cited numerous decisions of this court, including some of those cited by the lower court in its opinion.

2. The contracting officials of the Government did not accept petitioner's view of the Government's com-

mitment (obligation) under the contracts, and did not even express an opinion that the latter had breached the contracts and was liable in damages therefor.

3. That the ruling of the Comptroller General rejecting petitioner's claims for damages under the contracts "was based principally" on the fact that Par. 5 of Form S. P. O. No. 7 obligated the Government only for "actual operating time", and petitioner's equipment was admittedly never used by the Government.

4. That in the second and third contracts there was no repugnancy between Par. 5 of the printed Form S. P. O. No. 7 and the express typewritten provision in each controlling the abatement, under that provision, of the monthly rental; but this provision made "doubly clear" the intention of the Government to obligate itself only for the "actual time" that petitioner's equipment was in use.

Petitioner says that none of the cases cited in respondent's brief sustains said first contention, but to the contrary a number of them sustain petitioner's construction of said contracts; that the admittedly undisputed and documentary facts shown by the printed record refute the second and third factual contentions of said brief; and that under the uniform decisions of this court over a period of more than fifty years the fourth contention of said brief is wholly untenable and devoid of merit.

Petitioner respectfully presents herewith a note of argument in the nature of a reply to said opposition brief for respondent, and asks that it be read and considered in support of this petition; and for the reasons assigned in its original petition and supporting

brief for the granting of said writ of certiorari, as well as those assigned herein, petitioner prays that its application therefor may be reconsidered and reheard, and upon such rehearing granted, and the judgment and opinion complained of reviewed and reversed by this honorable court.

Respectfully,

G. T. FOGLE & COMPANY, PETITIONER.
By Counsel.

LILLIAN S. ROBERTSON,
Counsel for Petitioner.

HENRY S. CATO,
Of Counsel.

United States of America,
State of West Virginia,
County of Kanawha, to-wit:

We, Lillian S. Robertson, counsel for petitioner in the above entitled action and proceeding, and Henry S. Cato, of counsel therein, do certify that the foregoing petition for a rehearing of the application for a writ of certiorari made therein is presented in good faith and not for delay.

Given under our hands this 4th day of November, 1943.

LILLIAN S. ROBERTSON.
HENRY S. CATO.

NOTE OF ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

The authorities cited by respondent do not support the lower court's interpretation of the contracts as mere options,—offers by petitioner for the execution of unilateral contracts —, or its interpretation of the first contract as not containing a necessarily implied promise by the Government to operate the mixer for the full 100 hours stipulated in the contract.

Taking the cited authorities upon this point in their order, and beginning with those originally cited in the lower court's opinion, *Brawley* v. *United States,* 96 U. S. 168, the "cordwood" case, was a typical "more or less" contract with the Government, and the contract therein clearly distinguishable from the mixer contract in both facts and principle. This distinction is pointed out at considerable length in petitioner's supporting brief, at pages 55 and 56, and need not be repeated here.

Simpson v. *United States,* 199 U. S. 397, involved another "more or less" contract with the Government for furnishing fresh beef to troops stationed in the interior of the island of Cuba, as their commanding officers "from time to time * * * may require". The only questions presented for decision were, first, whether the above quoted words meant such quantities as the commissaries might make requisition for, or such quantities as they might need; and, second, whether the camp at Los Quemados was "situated within the interior of the island" within the true intent of the contract; and this court, deciding the second question against the claimant, held that such decision, in disposing of the case, disposed of the first question. The court further

held that a conversation of the claimant with the Commissary General before the contract was made, in which the latter stated, in effect, that it was the purpose and intent of the Department to contract with claimant for fresh beef for the entire island of Cuba, both interior and seacoast, when Swift & Company could not furnish refrigerated beef, was inadmissible as flying in the face of the written contract, which confined the undertaking of the United States to beef for camps in the interior, and even if admitted would not be definite enough to change the plain meaning of the written words; citing *Brawley* v. *United States, supra,* and *Simpson* v. *United States,* 172 U. S. 372, 377. The latter case, parenthetically, the only one cited in either the lower court's opinion or respondent's brief to the point under discussion which is not a "more or less" contract case, is interesting as being the direct converse of the present case. It involved the interpretation of a contract for the construction of a dry dock at Brooklyn Navy Yard, according to plans and specifications prepared by the *contractors,* upon a site to be selected by the United States. It was recited in the opening portion of the specifications that the dock was to be built in the navy yard upon a site which was "available". In the course of excavation for the foundations of the dock the contractors encountered quicksand, the presence of which delayed the completion of the work. Nearly three years after it was completed, and the contractors had been paid the full contract price, they made claim for a large amount for extra services rendered and material furnished upon the ground that the site was not "available", owing to the unfavorable and unsuitable character of the soil. This court held that there was no statement, agreement, or even intimation in the contract of any warranty, express or implied, by the United States

as to the character of the underlying soil, and that no such guaranty or warranty could be evolved "by a forced and latitudinarian construction of the word 'available' ", used only in the nature of a recital in the specifications, prepared by the contractors, and not in the contract. In the present case the Government prepared the mixer contract and the general specifications thereof (Form S. P. O. No. 7), and the contractor agreed to the perfectly clear provision of Par. 5 of the specifications that it was only to be paid for the hours the mixer was actually operated—its use hours—, this being the only way in which equipment rented by the hour could be paid for. But the lower court, "by a forced and latitudinarian construction" of the words, "Payment will be made only for such actual operating time", contrary to their intrinsic, natural meaning when read as a part of the entire contract, found that these words made it optional with the Government, after delivery of the equipment, in good operating condition, upon the government work, to operate it at all, and the contractor took the risk that it would never be operated, and there would be no actual operating time, and consequently no payment of rental. In the circumstances it may be of some significance that though cited and relied upon in the lower court's opinion counsel for respondent made no mention of this case in their brief.

Bulkley v. *United States,* 19 Wall. 37, 40, involved the construction of a "more or less" contract for the transportation of army supplies. Bulkley agreed to transport any quantity of such supplies—between 100,000 and 10,000,000 pounds—that might be turned over to him for that purpose within a fixed period, upon due notice to him of the quantity, etc., to be transported at any one time, the period of notice to be according to the quan-

tity specified. He received notice that transportation for 1,700,000 pounds was needed, together with an inquiry as to whether he was prepared to transport that additional quantity of freight, replied that he was, and went to the expense of such preparation. The United States did not need transportation for 1,690,074 pounds of the quantity covered by its notice, and did not offer this freight poundage to him. The court held that Bulkley's contract was to transport such freight, in such quantities, as should be offered to him, but there was no agreement by the Government to furnish him any freight; and that while under the contract he could not recover as damages the profits he would have made had the freights withheld been furnished him, he was entitled to recover for the expense to which he was subjected in making ready under the government's notice to transport the withheld freight. Mr. Justice Swayne, delivering the opinion, says in discussing the contract:

> "There is * * * no agreement to furnish such freights or any freights; the effect of the notice (that transportation from Fort Leavenworth of 1,700,000 pounds was needed, and that Bulkley should prepare to handle it) was to signify a purpose on the part of the government, and that purpose was liable to be changed at any time before it was executed. * * * It was doubtless known to the officer who entered into the contract on behalf of the United States that in the exigencies of the public service more or less transportation, or none, might be required at any given time and place, contrary to what had been specified and intended down to the last moment. Hence, while it was stipulated that actual transportation should be paid for at the rates specified, an unfettered discretion was reserved to the government as to everything beyond that point.

> * * * It (the contract) committed the government to nothing but to pay for services rendered. * * * In making ready to meet the requirements of the notices Bulkley was subjected to the loss of time, to trouble, and expense. He is entitled to be paid accordingly. Such is the implication of the contract, *and what is implied in a contract * * * is as effectual as what is expressed. Human affairs are largely conducted upon the principle of implications.*"

Lobenstein v. *United States,* 91 U. S. 324, was a suit upon contracts with the United States for all hides of beef cattle slaughtered for Indians which the Superintendent for Indian Affairs should decide were not required for their comfort. No cattle were in fact slaughtered for the Indians, but the cattle were turned over directly to the Indians, who slaughtered them and took the hides. It was held that the order of the Commissioner turning over the cattle to the Indians was in effect a decision that the hides were required for their comfort, and excused the United States from delivery to the contractor; and that the estimate of the number of hides—about 2,000, more or less, and about 4,000, more or less—, as made in the contracts, created no obligation on its part to deliver that number, as the conditions of the agreement rendered it impossible for either party to determine how many would be reserved for the Indians.

Kihlberg v. *United States,* 97 U. S. 398, involved a contract similar to that in the *Bulkley Case,* for the transportation of military and other government supplies in any number of pounds between 100,000 and 10,000,000, at an agreed compensation of so much per mile for each

one hundred pounds delivered, the distances to be ascertained and fixed by the Chief Quartermaster, and the quartermaster at the point of delivery to fix the number of pounds delivered. The contractor sued on the contract upon the theory that he had hauled the supplies a greater distance than found by the chief quartermaster, and that he was entitled to payment according to the number of pounds received for transportation in all cases where the loss in weight occurring during transportation was without neglect on his part. The court held that the action and finding of the chief quartermaster, in the absence of evidence of fraud or bad faith, in the matter of distances, was conclusive upon the parties, and that the contractor was only entitled to recover for the number of pounds actually delivered by him. Just why this case is cited is not apparent, unless it was in support of the assertion in the brief that "there is no evidence of fraud or bad faith on the part of the Government in failing to use the equipment." This *ipse dixit*, appearing also in the lower court's opinion, is refuted by the record, which shows, in the petition herein, the fact, sworn to in the petition to the Works Progress Administration made a part of the petition here, a photostatic copy of which original petition is exhibited with the Government's answer, and again sworn to in the petition herein, and never questioned or denied either in the pleadings or by any officer or agent of the United States, that this mixer was requisitioned by the Works Progress Administration, and delivered to it at West Hamlin, with full knowledge on the part of the receiving agents of the Government, at the time of such delivery, that it never had been needed on the work, had been requisitioned in error in the first instance, and never would be used or operated on the project; and that with such full knowledge

it was held on the project for more than four months before the owner was notified, in answer to its inquiry regarding unpaid rental, that the equipment had never been used "on account of adverse weather conditions", –a knowingly false statement–, and might be removed from the work. If this is not evidence of bad faith on the part of the agents of the Government, which can act only through agents, what would be such evidence?

Willard Co. v. *United States,* 262 U. S. 489, 493, 494, involved yet another typical "more or less" contract, for furnishing coal to the government, in which it was "distinctly understood and agreed * * * that the contractor will furnish any quantity of the coal specified that may be needed * * * irrespective of the quantities stated, the government *not being obligated to order any specific quantity* (Italics the court's)." In a suit to recover the market instead of the contract price for a portion of the coal delivered the *contractor* contended that its contract was not enforceable, for lack of consideration and mutuality, and therefore did not control the price of that part of the coal delivered under protest. This court held that there being nothing in the writing "which required the government to take, or limited its demand to, any ascertainable quantity", for lack of consideration and mutuality the contract was not enforceable; distinguishing it from the contract in *United States* v. *Purcell Envelope Co.,* 249 U. S. 313 (petitioner's brief, pp. 66-68), in that "there, the making and acceptance of the bid consummated the contract, and it was construed to bind the company to furnish and the Department to take the envelopes and wrappers specified which the department would need during the period covered by the contract". But the court further held that while the contract at its incep-

tion was not enforceable, it became valid and binding (upon the contractor) to the extent that it was performed by the latter. In the present case, by the making and acceptance of petitioner's bid (on the back of which the Government's contracting officers are instructed that "this form (Standard Form 33, Revised) meets the requirements of a formal contract (R. S. 3744)"), there was a consummated contract binding the Government to rent the mechanical services of the mixer in the fixed, definite quantity of 100 (use) hours, and the petitioner to deliver the equipment to the lessee, and keep it in good repair, until that quantity of services, measured in use hours, was furnished by it.

Atwater & Co. v. *United States,* 262 U. S. 495, 498, was a companion of the *Willard Case,* involving the same "more or less" contract for coal delivery, and decided upon the same principles. Here again the contractor raised the same question of lack of mutuality and consideration in the contract, and the court held, on the authority of the *Willard Case,* "that by the language of the contract the parties intended that the Department might call for more or less than the 200 tons mentioned therein, and that because of lack of consideration and mutuality the contract at its inception was not enforceable, but that it became valid and binding to the extent that it was performed." The court cited to the latter point *Charles Nelson Co.* v. *United States,* 261 U. S. 17, 67 L. Ed. 513, 514, in which case, involving a "more or less" contract for lumber for the Navy Department, the contractor denied that the writing signed by it was a binding contract, because there was no mutuality of obligation; but the government answered by citing the *Purcell Envelope Co. Case, supra,* and the court, distinguishing the latter at some length,

held that the question of lack of mutuality did not arise there, as it did in the lumber contract.

North American Com. Co. v. *United States,* 171 U. S. 110, 127, involved a suit by the Government upon "a so called lease" of seal fisheries in Behring Sea, for the recovery of annual rent reserved, the per capita bonus, and revenue tax upon each seal taken under the contract. The contract fixed the maximum number of seals that might be taken, which might be reduced by the Government, and provided for a proportionate reduction of the yearly rental in case of such reduction. For the year covered by the suit there was a reduction of this maximum number from 100,000 to 7,500. The contractor contended that not only the rental but the per capita royalty should be proportionately reduced. The court, denying the contractor's right to any per capita royalty reduction, after pointing out that it was directly to the interest of the Government under the contract to allow the largest possible catch, and to exercise great circumspection in prescribing any limitation of it, said, at page 127:

> On the other hand, it might be that each seal would cost more as the number taken was less, and that if the price of skins did not keep up, the company might be subjected to a loss, no matter how many it took, and the loss might be greater the more it took. *But that was a risk the company assumed, and no reason is perceived for relieving it from the consequences.*"

The italicized language above, taken from its context, is quoted with a note of finality in respondent's brief. Any contractor, buying anything for resale, be it seal skins, shoes, ships or sealing-wax, takes the risk of its

costing more than he can sell it for; and in this sense petitioner took the risk that the cost of transporting its equipment to and from the Government work, and maintaining and repairing it in 100 hours of operation, plus the wear and tear thereon, would be more than the $75.00 which the Government expressly agreed to pay for its use; but petitioner certainly did not anticipate, or have reason to anticipate, and consequently did not risk, the repudiation of this contract by the Government upon the ground of lack of mutuality and consideration on its part, rendering the contract unenforceable against it, as respondent's brief for the first time admits to be the effect of the lower court's construction of the Government's liability.

Summed up, all of the cases cited in respondent's brief to the point under discussion involve "more or less" contracts for the *sale,* or *delivery,* or both, of perishable or consumable goods or materials in quantity to or for the Government, and the question in each is what *quantity* of material was to be sold or delivered, and paid for on delivery; in none of them is there any question but that the quantity *delivered* is to be paid for. None of these cases involves a *lease* or *rental* of nonperishable or nonconsumable material, or a unit or units of heavy machinery for use by the Government. To the instant contract their "comparisons are odorous", as the most casual inspection of that contract must show. It is executed on the Government's Standard Form 33 (Revised), which form is titled "Invitation, Bid and Acceptance (Short Form Contract)". It invites petitioner (and eighteen others) to bid or offer, "subject to the conditions on the reverse hereof", to furnish "the following supplies, and/or services for delivery by truck to

West Hamlin, Lincoln Co., W. Va. Delivery required immediately":

"Item No. 1, Rental, 1 7 cu. ft. or 1 bag concrete mixer 10 hours Quantity, 1; Unit, hr.; Unit Price, Per hr."

In the invitation section of the form petitioner wrote: "1 bag "Jaeger" concrete mixer * * * Seventy-five (75) cents per hr."; and its bid or offer, made in the bid section of the form, was:

"September 11th, 1935. In compliance with the above invitation for bids, and subject to all the conditions thereof, the undersigned offers and agrees, if this bid be accepted within 2 days from the date of the opening (Sept. 13), to furnish any or all of the items upon which prices are quoted at the price set opposite each item f. o. b. at West Hamlin, W. Va., and unless otherwise specified within .... days after receipt of order". The bid was signed by petitioner's treasurer, sealed, and duly delivered to the Procurement Division of the Treasury Department. It was accepted by the Government on the acceptance section of the form, which section is titled "Acceptance by the Government", as follows:

"September 17, 1935. Accepted as to items num-
(Date)
bered . . . all

Name J. R. Downey Title Purchasing Assistant"

The apology for "spelling out" this contract, as it appears in the original in the certified record (Respondent's brief, foot-note 1, page 3), is that by so doing it speaks for itself as being a bilateral agreement, with

none of the elements of an option, and the complete antithesis of the "offer by petitioner for the execution of a unilateral contract, which could ripen into a 'valid and binding' agreement only if and when *accepted* by the Government's *actual use of the equipment*"—that is, if there can be a negative of such a hybrid positive—which respondent's brief gives form and definition as the measure of the Government's obligation. There are two elements in an option contract: First, the offer to sell, which does not become a contract until accepted; second, the completed contract to leave the offer open for the specified time; and these elements are wholly independent. *Hanly* v. *Watterson*, 39 W. Va. 214; 19 S. E. 536, 538. "An option is an *unaccepted* offer. It states the terms and conditions on which the owner is willing to * * * lease * * * if the holder elects to accept them within the time limited. If the holder does so elect he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract". *Johns* v. *Elkins*, 63 W. Va. 158, 162; 59 S. E. 961; *McMillan* v. *Philadelphia Co.*, 159 Pa. 142. Here there was an offer by petitioner to rent the equipment for a definite time, at a definite price, and if this offer was accepted *within two days after the opening of the bids* to *deliver* the equipment to the Government, by truck, f. o. b. West Hamlin. There was no agreement to leave the rental offer open for any period of time, hence there was no option contract even in its inception. The bid was opened on September 13th, and petitioner's offer was *accepted* by the Government on September 17th, and "Accepted as to items numbered . . . all"—not for 100 hours, "more or less", or with any other qualification. This acceptance consummated the formal contract between the parties, bilateral, mutual, and upon sufficient consideration, and upon its face and

by its express terms excluding interpretation as an option or *unaccepted* offer, unenforceable against the Government. This court's decision in *United States* v. *Purcell Envelope Co., supra,* upon the authority of *Garfielde* v. *United States,* 93 U. S. 242, that "the making and acceptance of the bid consummated the contract", together with its applications of that decision in the *Willard Company Case,* the *Atwater & Co. Case,* and the *Charles Nelson Co. Case, supra,* forecloses against the Government the contention that the instant contract bore such "scant obligation upon the part of the Government." Counsel for petitioner, in its original brief (page 74), made the considered assertion that no contracting officer for the Works Progress Administration, or any one else in the construction business, ever heard of, much less made, such a contract as the lower court construed the present one to be; and the intensive but futile search of Government counsel for a precedent to sustain that construction at least tends to bear out and confirm what "at first blush" might have seemed an overstatement. Certain it is, at all events, that the making of such a contract with the Government or any one else "must inevitably cast a reflection upon the sanity" of the owner of the equipment. *Coghlan* v. *Stetson,* 19 Fed. (C. C.) 727 (Petitioner's Brief, p. 68 *et seq.*).

To the point urged in respondent's brief that a necessarily implied promise by one of the parties to a contract cannot be found by judicial exposition unless the contract is ambiguous, there is cited the holding of this court in the *Kihlberg Case,* above discussed, that the contract there considered expressly providing that the Quartermaster General should solely determine the freight haulage distances, "no exposition is allowable contrary to the express words of the instrument". Not

only does petitioner have no quarrel with this statement of the law in that case, but it has consistently relied upon this principle in its application to the instant contract, urging that the express words of the instrument showing that petitioner, as lessor, and the Government, as lessee, rented the equipment for 100 hours, an exposition or interpretation of the contract, contrary to its express words, as a mere option to the Government to use it for 100 hours, "more or less", never accepted, was not allowable. However, if the *Kihlberg Case* is relied upon as supporting respondent's position that no necessarily implied promise can be read into and treated as a part of a written contract by judicial construction unless the language of the contract is ambiguous, the answer to that position is, first, that no question of an implied promise arose in the case, nor is there even a shadow of ambiguity in the language of the contract there considered; and, second, that judicial interpretation of the necessary implications of a contract is not restricted by any condition precedent that the contract must be ambiguous; the scope of such interpretation is much broader, and it may be and should be exercised where and whenever the implied provisions "are indispensable to effectuate the intention of the parties, and * * * arise from the language of the contract and the circumstances under which it was made." *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 325; *Great Lakes, etc., Transp. Co.* v. *Scranton Coal Co.*, 239 Fed. 603; and authorities cited at pages 40-50, petitioner's supporting brief. Finally, petitioner is indebted to respondent's counsel for the citation of this court's decision in the case of *Bulkley* v. *United States*, 19 Wall. 37, 40, *supra*, where Mr. Justice Swayne puts this principle of interpretation, the scope of its application, the whole rationale of the principle itself, and petitioner's entire contention

upon this point, into two brief sentences:

> "What is implied in a contract * * * is as effectual as what is expressed. Human affairs are largely conducted upon the principle of implications."

The contracting officials of the Government, acting within the scope of their authority, formally and in writing accepted petitioner's view of the Government's obligation under the contracts, and expressed their opinion that the Government had breached each and all of them.

Respondent's brief (foot-note 7, page 9), expresses "real doubt" of the above proposition. Here is the record to support it, taken from the letter of the United States Treasury Department Procurement Division to the United States Treasury Accounts Office, at Charleston, West Virginia (R. 10-15).

Claim No. One, Mixer.

> "Claimant avers that the equipment was held by the Works Progress Administration for a period of four months, and the claim is based on *damages sustained* by the fact that the equipment was *held and not used,* thus causing a loss of income that may have accrued should the equipment have been either *used* by the Works Progress Administration or surrendered to the possession of the claimant. * * * The statements made by the claimant that the equipment was held by the Works Progress Administration for the period stated are confirmed" (R. 10-11).

Claim No. Two, Shovel.

> "At the time this equipment was rejected a

shovel of 1½ cubic yard capacity was requisitioned and later used for completion of the work on the project. Your attention is called to the reason given for the rejection of the claimant's equipment *in that the rejection was not based on the fact that the equipment did not meet with the specifications of the contract.* ° ° ° This claim is not for actual services but for *liquidated damages by reason of violation of contract* ° ° °" (R. 12).

Claim No. Three, Mixer.

"A request for cancellation of the incumbrance provided for this contract ° ° ° indicated '*equipment was requisitioned in error after completion of project;* a balance of $9.18 is being left on this purchase order as claim for such amount was made by vendor to cover cost of moving'" (R. 13).

As to All Three Claims.

"° ° ° There is no question in the mind of the Procurement Officer but that the contractor was damaged financially by reason of the *Government failing to complete* the three contracts covered by the first three claims." (R. 14)

To borrow a rhetorical question from the lower court's opinion, "What could be more free from ambiguity than the clear statement that"

"° ° ° The contractor was damaged financially *by reason of the Government failing to complete* the three contracts." (All italics ours)

The ruling of the Comptroller General rejecting petitioner's claim for damages under the contracts was based solely upon the ground that the claim under each was for damages, and the appropriation to Works Progress Administration did not provide expressly, or by implication, for the payment of damages therefrom.

Respondent's brief asserts (p. 5) that the ruling of the Comptroller General rejecting petitioner's claims for damages under the three contracts "was based principally" on the fact that Paragraph 5 of S. P. O. No. 7 obligated the Government only for "actual operating time", and petitioner's equipment was admittedly never used by the Government. (R. 21-22, 23)." It is believed that this assertion was inadvertently made, for the very record pages referred to wholly refute it. Here is what the record shows:

As to the mixer:

> "° ° ° The mixer admittedly never having been used, your claim becomes one in the nature of damages, *not for rental,* but *for the failure of the Government to use the mixer.* Your claim is not one for compensation under the contract, but is one for *damages on account of the alleged breach thereof by the Government.*
>
> "Under Section 3678 Revised Statutes appropriations made for the various branches of expenditure in the public service are required to be expended solely for the objects for which they are respectively made and for no others.
>
> "*The appropriation herein involved does not provide expressly, or by implication, for the payment of damages. Consequently it appears there is no authority for payment of this portion of your claim.*" (R. 21, 22)

As to the shovel:

> "Even though it be admitted, as alleged, that the equipment was rejected in error, the fact remains that no usage was made of the subject equipment * * *, hence * * * no payment of *rental* therefor can be made.
>
> "This portion of your claim being one for anticipated profits and *in the nature of damages for breach of contract* by the Government *is not for payment inasmuch as no appropriation is available therefor.*" (R. 22)

As to the second mixer:

> "* * * Upon delivery same was rejected, the project having been completed and there being no need for the mixer.
>
> "It is alleged the payment of $9.18 was incurred as the cost of delivery, for which amount claim is made. Said claim *being obviously one for damages* is likewise not for payment, *there being no appropriation available therefor.*" (R. 22, 23)

The express written provisions of the second and third contracts dominate and control their printed provisions.

If to cite the uniform decisions of this court over a period of fifty years (Pet. 59-62) in support of this proposition is to "spell out" the repugnancy between the printed and the express written conditions common to both contracts, then petitioner must "own the soft impeachment" of respondent's brief. Paragraph 12, the concluding paragraph, of Form S. P. O. No. 7, provides that the form "shall be attached" to Standard Form 33 (Revised), and that "the conditions therein provided

shall likewise apply *so far as applicable*". (R. 9) The condition of Paragraph 5 of the form, while applicable to the first contract of rental, by the use hour, is not applicable to a monthly rental, at a monthly rate, where the payment of the monthly rental is not conditioned upon the operation of the equipment, but is to be made at all events. And because this printed condition was inapplicable to the monthly rental contracts, and was so recognized by the experienced contracting officers for the Government, they wrote into the invitation for bids this special provision of the monthly contracts that the contractor must bear any loss to the Government occasioned by the mechanical break-down of his equipment or the absence of his operator, and abate the monthly rental accordingly, such abatement to be made in either or both of the two events specified; and the expression of these two reasons for deduction from or abatement of the monthly rental, upon familiar principles, excluded any and all other grounds for deduction or abatement. The printed condition and the express written condition in each contract are so clearly irreconcilable and so obviously repugnant, and the hornbook law that the written provision must control so long settled by this court and so universally recognized, that petitioner cannot believe the argument for respondent to the contrary, measurably ingenious but none too ingenuous as it is, to be anything "more than dialectical", and impelled by the exigencies of defending a legalistically untenable position.

Petitioner's mixer was taken without just compensation within the meaning of the Fifth Amendment.

Respondent's brief asserts that the property of petitioner in question was in no sense "taken" by the Gov-

ernment within the meaning of the Fifth Amendment, but to the contrary "was delivered by petitioner to the site of the project for a specific period, pursuant to a contract voluntarily made and specifying the conditions under which petitioner was to be paid". The trouble with this argument is that while petitioner, in good faith, *delivered* its property to the agents of the Government under the written contract, these agents *took* and *held* the property for four months with knowledge at the time of taking it that it would never be used and never be paid for, under the conditions of the contract or otherwise, and then, "piling Pelion on the top of Ossa", gave the knowingly false excuse for such taking and withholding that "adverse weather conditions" prevented the use of the equipment. The authorities cited in support of respondent's position in the matter not only fail to do so, but to the contrary support that of petitioner. In *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46, 57, this court, quoting from *United States* v. *Lynah*, 188 U. S. 445, 462, 465 (Pet. Brief, 79), says:

> " 'The law will imply a promise to make the required compensation where property to which the Government asserts no title is taken, pursuant to Act of Congress, as private property to be applied for public uses'; or, in other words: 'Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor.' "

And in *United States* v. *North American Co.*, 253 U. S. 330, it is held:

> "When the Government, without instituting condemnation proceedings, appropriates for the public use, under legislative authority, private

property to which it asserts no title, it impliedly promises to pay therefor.

The test in all these cases is whether the Government has title to the property taken; if it has title (as in *Klebe* v. *United States*, 263 U. S. 188) there can be no implied promise to pay therefor; if it asserts no title, there is an implied promise to pay for the property. Here, of course, the Government claims no title to the mixer; and its refusal to pay compensation therefor is based upon its possession of the mixer under a contract to pay such compensation which it now repudiates as unenforceable against it from the inception of the agreement, and, consequently, when such possession was acquired. May the Government, with any degree of consistency, rely upon this contract to sustain the taking of petitioner's property, and repudiate it to avoid the payment of compensation therefor?

All of which is respectfully submitted.

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